

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Health Care Decisions for Adults
Without Decisionmaking Capacity

December 1998

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

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This publication (#201) will appear in Volume 29 of the Commission's *Reports, Recommendations, and Studies*.

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NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Health Care Decisions for Adults Without Decision-making Capacity*, 29 Cal. L. Revision Comm'n Reports 1 (1999). This is publication #201.

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STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
650-494-1335

ARTHUR K. MARSHALL, Chairperson
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ROBERT E. COOPER
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PAMELA L. HEMMINGER
EDWIN K. MARZEC
RONALD S. ORR
SANFORD M. SKAGGS
COLIN W. WIED

December 11, 1998

To: The Governor of California, and
The Legislature of California

This recommendation proposes a new Health Care Decisions Law to consolidate the Natural Death Act and the statutes governing the durable power of attorney for health care, and provide comprehensive rules relating to health care decisionmaking for incapacitated adults. The proposed law, drawing heavily from the Uniform Health-Care Decisions Act (1993), includes new rules governing individual health care instructions, and provides a new optional statutory form of an advance health care directive.

The proposed law would add procedures governing surrogate health care decisionmakers (“family consent” law) where an individual has not appointed an agent and no conservator of the person has been appointed, and procedures for making health care decisions for patients who do not have any surrogate willing to serve.

Conforming changes in the procedure for obtaining court authorization for medical treatment would make clear that courts in proper cases have the same authority as other surrogates to make health care decisions, including withholding or withdrawal of life-sustaining treatment. Similarly, the statute governing decisionmaking by conservators for patients who have been adjudicated to lack the capacity to make health care decisions are conformed to the standards governing other health care surrogates.

This recommendation is submitted pursuant to Resolution Chapter 91 of the Statutes of 1998.

Respectfully submitted,

Arthur K. Marshall
Chairperson

ACKNOWLEDGMENTS

Many individuals and organizations have participated in the Commission's work on this recommendation. The Commission would like to acknowledge the assistance provided by those who have supported all or part of the proposal as well as those who have expressed objections to one or more aspects. The participation of a broad spectrum of experts aids the Commission in preparing a better proposal, and the Commission benefits greatly from the public service performed by these individuals and organizations.

The Commission is indebted to its consultant, Prof. David English, who was also the reporter for the Uniform Health-Care Decisions Act, which provided the starting point for much recommendation and Professor English regularly attended meetings and commented on materials as the project progressed. The Commission appreciates the substantial amount of time devoted by many of those who wrote commentaries on proposed drafts and who attended Commission meetings. Particularly noteworthy has been the assistance provided by James L. Deeringer (liaison with the State Bar Estate Planning, Trust and Probate Law Section Executive Committee), Alice Mead (California Medical Association), and Matthew S. Rae, Jr. (California Commission on Uniform State Laws), who regularly attended Commission meetings and provided written materials.

The Commission would also like to thank the members of the State Bar Advance Directive Committee (including Leah V. Granof, current Chair, Faye Blix, James L. Deeringer, David English, and Harley Spitler), the Long Term Care Subcommittee of the Los Angeles County Bar Association Bioethics Committee (including Christine J. Wilson, R.N., J.D., Chair, Terri D. Keville, J.D., and Linda Faber-Czingula, R.N.), and the Beverly Hills Bar Association Probate, Trusts and Estates Section Executive Committee (including Jeannette Hahm, Chair, Phyllis Cardoza, Joelle Drucker, Susan Jabkowski, Marc L. Sallus, Bert Z. Tigerman, and Geraldine Wyle).

The Commission received valuable assistance from a number of law students in the course of this project: Cynthia Bradford and Andrew Jaramillo (Stanford Law School), Matthew Waddell and

Tina Chen (University of Pennsylvania Law School), and researchers in the Hastings Law School Public Law Research Institute (under the direction of Stephanie E. Shaw), including Kimberly A. Jackson, Lisa Pau, Suzanne Robinson, Robert E. Sheehan, Dawn Takeuchi, and Nicole A. Wesley.

The individuals listed below also assisted the Commission by submitting written comments or participating at Commission meetings. Inclusion of the name of an individual or organization should not be taken as an indication of the individual's opinion or the organization's position on any part of the proposed law. The Commission regrets any errors or omissions that may have been made in compiling these acknowledgments.

ELIZABETHANNE MILLER ANGEVINE
Miller & Angevine, Whittier

SHERRY BRAHENY, M.D.
*California Medical Association Bioethics
Committee, San Diego*

ERIC M. CARLSON
*Nursing Home Project
Bet Tzedek, Los Angeles*

PROF. SUSAN CHANNICK
*California Western School of Law
San Diego*

KATE CHRISTENSEN, M.D.
Kaiser Permanente

LORI COSTA
California Association of Health Facilities

LINDA DANIELS, M.D., J.D.
*Bioethics Committee, San Diego County
Medical Society*

CAROL GALLEGOS
*Department of Health Services,
Sacramento*

MARGE GINSBURG
Sacramento Healthcare Decisions

MICHAEL GUNTHER-MAHER, M.D.
Echo, Sacramento

PAUL GORDON HOFFMAN
*Hoffman Sabban & Watenmaker
Los Angeles*

MARLYS HUEZ
*Department of Health Services,
Sacramento*

MELVIN H. KIRSCHNER, M.D.
*LACMA-LACBA Joint Committee on
Biomedical Ethics, Los Angeles*

PATRICIA L. MCGINNIS
*California Advocates for Nursing Home
Reform, San Francisco*

RONALD B. MILLER, M.D.
*U.C. Irvine College of Medicine; Council
on Ethical Affairs, California Medical
Association*

ROBERT D. ORR, M.D.
Loma Linda University Medical Center

RUTH E. RATZLAFF
Attorney, Fresno

LOIS RICHARDSON
*California Healthcare Association
Sacramento*

LAWRENCE J. SCHNEIDERMAN, M.D.
U.C. San Diego School of Medicine

HERBERT SEMMEL
*National Senior Citizens Law Center
Los Angeles*

HARLEY SPITLER
Cooley Godward, San Francisco

KEVIN G. STAKER
Staker & Associates, Camarillo

MAUREEN SULLIVAN
*California Healthcare Association,
Sacramento*

SHANNON SUTHERLAND
*California Nurses Association,
Sacramento*

BRUCE HUDSON TOWNE
Attorney, Sacramento

STUART D. ZIMRING
Attorney, North Hollywood

HEALTH CARE DECISIONS FOR ADULTS WITHOUT DECISIONMAKING CAPACITY

California has been a pioneer in the area of health care decisionmaking for adults without decisionmaking capacity, with the enactment of the 1976 Natural Death Act¹ and the 1983 Durable Power of Attorney for Health Care.² Legislation in other states over the last 15 years, enactment of the federal Patient Self-Determination Act in 1990,³ and promulgation of a new Uniform Health-Care Decisions Act in 1993,⁴ suggest the need to review existing California law and consider revising and supplementing it.

California law does not adequately address several important areas of the law concerning health care decisionmaking for adults who lack capacity:

(1) Existing law does not provide a convenient mechanism for making health care treatment wishes known and effective, separate from the procedure for appointing an agent.

(2) The principles governing family consent or surrogate decisionmaking in the absence of a power of attorney for health care are not clear.

(3) There are no general rules governing health care decisions for incapacitated persons who have no advance directive or known family or friends to act as surrogates.

1. 1976 Cal. Stat. ch. 1439. This was also the year the New Jersey Supreme Court decided the well-known Karen Ann Quinlan case. *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976), *cert. denied*, 429 U.S. 922 (1976).

2. 1983 Cal. Stat. ch. 1204, enacted on Commission recommendation. See *infra* note 8.

3. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, §§ 4206, 4751, 104 Stat. 1388, 1388-115 to 1388-117, 1388-204 to 1388-206. See particularly 42 U.S.C.A. §§ 1395cc(a), 1396a(w)(1) (Westlaw 1998).

4. 9 (Pt. 1) U.L.A. 285 (West Supp. 1998) [hereinafter UHCDA].

(4) Statutes governing court-authorized medical treatment for patients without conservators are unduly limited.

The proposed Health Care Decisions Law provides procedures and standards for making decisions in these situations, and adopts consistent rules governing health care decision-making by surrogates, whether they are family members, agents, public or private conservators, surrogate committees, or courts. The proposed law makes many revisions to promote the use and recognition of advance directives, to improve effectuation of patients' wishes once they become incapable of making decisions for themselves, to simplify the statutory form and make it easier to use and understand, and to modernize terminology. However, the scope of the proposed law is limited: it governs health care decisions to be made for adults at a time when they are incapable of making decisions on their own and provides mechanisms for directing their health care in anticipation of a time when they may become incapacitated. It does not govern health care decisions for minors or adults having capacity.

NEED FOR REVISED LAW

In a 1991 article entitled *Time for a New Law on Health Care Advance Directives*, Professor George Alexander gives the following useful overview:⁵

During the last decade, states have enacted three different kinds of documents to deal with health care of incompetent patients. The legislation's main impetus and central focus have been to provide a procedure to approve life support termination in appropriate cases, although it also addresses other health care concerns. The earliest of the statutes was a natural death act, which authorizes a directive, popularly called a living will, to physicians. The second was a general durable power of attorney, sometimes in the form of a spe-

5. 42 Hastings L.J. 755, 755 (1991) (footnotes omitted).

cially crafted health care durable power of attorney, which essentially empowers an appointed agent to make appropriate decisions for an incompetent patient. The agent is bound by directions contained in the appointing power. Finally, some states have enacted family consent laws empowering others, typically family, to decide health care matters absent a directive or power of attorney to guide them. At the end of 1990, Congress gave these laws new importance by mandating their observance.

The statutes differ; provisions of one form conflict with provisions of another form. Most contradictions raise problems, some nettlesome, others destructive of important interests. After more than a decade of experience with such forms, it is time to review the present state of the laws and to coordinate and debug them. In the author's view, a single statute incorporating the best of each of the three types of law is now in order.

These concerns are addressed by the proposed Health Care Decisions Law.

BACKGROUND AND OVERVIEW

The right of a competent adult to direct or refuse medical treatment is constitutionally protected. This "fundamental liberty interest" is inherent in the common law and protected by federal and state constitutional privacy guarantees.⁶ The

6. See generally *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990); *Cobbs v. Grant*, 8 Cal. 3d 229, 242, 502 P.2d 1, 104 Cal. Rptr. 505 (1972); *Barber v. Superior Court*, 147 Cal. App. 3d 1006, 1015, 195 Cal. Rptr. 484 (1983); *Bartling v. Superior Court*, 163 Cal. App. 3d 186, 195, 209 Cal. Rptr. 220 (1984); *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 1137, 225 Cal. Rptr. 297 (1986); *Conservatorship of Drabick*, 200 Cal. App. 3d 185, 206, 245 Cal. Rptr. 840 (1988); *People v. Adams*, 216 Cal. App. 3d 1431, 1437, 265 Cal. Rptr. 568 (1990); *Donaldson v. Van de Kamp*, 2 Cal. App. 4th 1614, 1619, 4 Cal. Rptr. 2d 59 (1992); *Thor v. Superior Court*, 5 Cal. 4th, 725, 731, 855 P.2d 375, 21 Cal. Rptr. 2d 357 (1993); *Rains v. Belshé*, 32 Cal. App. 4th 157, 166, 38 Cal. Rptr. 2d 185 (1995).

In the Natural Death Act, the Legislature made the explicit finding that "an adult person has the fundamental right to control the decisions relating to the rendering of his or her own medical care, including the decision to have life-sustaining treatment withheld or withdrawn in instances of a terminal condition

proposed law reaffirms this fundamental right along the lines of the Uniform Health-Care Decisions Act, which

acknowledges the right of a competent individual to decide all aspects of his or her own health care in all circumstances, including the right to decline health care or to direct that health care be discontinued, even if death ensues. An individual's instructions may extend to any and all health-care decisions that might arise and, unless limited by the principal, an agent has authority to make all health-care decisions which the individual could have made. The Act recognizes and validates an individual's authority to define the scope of an instruction or agency as broadly or as narrowly as the individual chooses.⁷

There are five main approaches to health care decisionmaking for patients lacking capacity that are appropriate for statutory implementation:

1. Power of Attorney

California has a detailed statute governing durable powers of attorney for health care (DPAHC) and providing a special statutory form durable power of attorney for health care.⁸ The

or permanent unconscious condition.” Health & Safety Code § 7185.5(a). The right is not dependent on statutory recognition and continues to exist outside of statutory provisions.

7. UHCDA Prefatory Note.

8. Prob. Code § 4600 *et seq.* This statute and its predecessor in the Civil Code were enacted on Commission recommendation. See:

Recommendation Relating to Durable Power of Attorney for Health Care Decisions, 17 Cal. L. Revision Comm'n Reports 101 (1984) (enacted as 1983 Cal. Stat. ch. 1204). For legislative history, see 17 Cal. L. Revision Comm'n Reports 822 (1984); *Report of Assembly Committee on Judiciary on Senate Bill 762*, 17 Cal. L. Revision Comm'n Reports 889 (1984).

Recommendation Relating to Statutory Forms for Durable Powers of Attorney, 17 Cal. L. Revision Comm'n Reports 701 (1984) (enacted as 1984 Cal. Stat. chs. 312 & 602). For legislative history, see 18 Cal. L. Revision Comm'n Reports 18-19 (1986); *Report of Assembly Committee on Judiciary on Senate Bill 1365*, 18 Cal. L. Revision Comm'n Reports 45 (1986).

DPAHC requires appointment of an attorney-in-fact (“agent” in the language of the statutory form) to carry out the principal’s wishes as expressed in the power of attorney or otherwise made known to the attorney-in-fact, but the attorney-in-fact also has authority to act in the best interest of the principal where the principal’s desires are unknown.⁹ The rules governing the power of attorney for health care are generally carried forward in the proposed law.

2. Natural Death Act, Living Will

California’s Natural Death Act (NDA) provides for a declaration concerning continuation of life-sustaining treatment in the circumstances of a permanent unconscious condition. Under the original NDA, the patient executed a “directive to physicians.” Under the new UHCDA, this type of writing is an “individual instruction” (although the instruction may also be given orally). Case law validates expressions of the patient’s health care desires that would fall under the general category of a “living will.” The proposed law integrates these forms into a comprehensive statute.

Recommendation Relating to Elimination of Seven-Year Limit for Durable Power of Attorney for Health Care, 20 Cal. L. Revision Comm’n Reports 2605 (1990) (enacted as 1991 Cal. Stat. ch. 896). For legislative history, see 21 Cal. L. Revision Comm’n Reports 22 (1991).

Comprehensive Power of Attorney Law, 24 Cal. L. Revision Comm’n Reports 111 (1994) (enacted as 1994 Cal. Stat. ch. 307). For legislative history, see 24 Cal. L. Revision Comm’n Reports 567 (1994). The law as enacted, with revised Comments and explanatory text, was printed as *1995 Comprehensive Power of Attorney Law*, 24 Cal. L. Revision Comm’n Reports 323 (1994).

In the Commission’s study resulting in the comprehensive Power of Attorney Law, substantive review of health care decisionmaking issues was deferred for consideration as the second part of the study. This enabled legislative enactment of the comprehensive restructuring of the power of attorney statutes to proceed without further delay and was also necessary in light of other legislative priorities.

9. See Prob. Code § 4720.

3. Statutory Surrogacy

As in the case of wills and trusts, most people do not execute a power of attorney for health care or an “individual instruction” or “living will.” Estimates vary, but it is safe to say that only 10-20% of adults have advance directives.¹⁰ Consequently, from a public policy standpoint, the law governing powers of attorney and other advance directives potentially affects far fewer people than would a law on consent by family members and other surrogates. Just as the law of wills is complemented by the law of intestacy, so the power of attorney for health care needs an intestacy equivalent — some form of statutory surrogate health care decisionmaking. This critical area is addressed by the proposed Health Care Decisions Law.

4. Court-Appointed Conservator

California law provides a highly developed Guardianship-Conservatorship Law.¹¹ The Lanterman-Petris-Short Act provides a special type of conservatorship for the gravely dis-

10. See Hamman, *Family Surrogate Laws: A Necessary Supplement to Living Wills and Durable Powers of Attorney*, 38 Vill. L. Rev. 103, 105 n.5 (1993) (reporting 8-15% in 1982, 1987, and 1988 surveys). One intention of the federal Patient Self-Determination Act in 1990, *supra* note 3, was to increase the number of patients who execute advance directives. See Larson & Eaton, *The Limits of Advance Directives: A History and Assessment of the Patient Self-Determination Act*, 32 Wake Forest L. Rev. 249, 257-59 (1997). The educational efforts under the PSDA may have resulted in greater use of powers of attorney for health care, but not significantly. See *id.* at 276-78 (estimates prior to PSDA ranged from 4-28%, mostly in 15-20% range; afterwards, “little or no increase” or “no significant increase”). A Government Accounting Office report found that 18% of hospital patients had advance directives, as compared with 50% of nursing home residents. *Id.* at 275 n.184.

11. Prob. Code § 1400 *et seq.* The Guardianship-Conservatorship Law was enacted on Commission recommendation. See *Guardianship-Conservatorship Law*, 15 Cal. L. Revision Comm’n Reports 451 (1980). For provisions relating to health care, see, e.g., Prob. Code §§ 1880-1898 (capacity to give informed consent to medical treatment), 2354 (medical treatment of conservatee not adjudicated to lack capacity), 2355 (medical treatment of conservatee adjudicated to lack capacity), 2357 (court-ordered medical treatment).

abled.¹² These provisions would not generally be revised in this recommendation.¹³

5. Other Judicial Intervention

A special procedure for court-authorized medical treatment is available for adults without conservators.¹⁴ In a related revision, the proposed law conforms the scope of this procedure to the proposed Health Care Decisions Law.

The general power of attorney statutes were recently reviewed and revised on Commission recommendation.¹⁵ In its report, the Commission noted that it had “not made a substantive review of the statutes concerning the durable power of attorney for health care [I]t would have been premature to undertake a detailed review of the health care power statutes before the National Conference of Commissioners on Uniform State Laws completed its work on the Uniform Health-Care Decisions Act.”¹⁶ Now that the uniform act has been promulgated, the time is ripe for a thorough review of health care decisionmaking for adults who lack capacity to make decisions for themselves.

12. Welf. & Inst. § 5350 *et seq.*

13. Communications to the Commission suggest that the procedure for court-authorized medical treatment and related conservatorship provisions should be reviewed for consistency with the scope of the proposed Health Care Decisions Law. As noted below, this recommendation proposes revisions in Probate Code Sections 3200-3211, and in Section 2355 (medical treatment of conservatee adjudicated to lack capacity); but consideration of broader revisions in the Guardianship-Conservatorship Law is reserved for future study.

14. Prob. Code § 3200 *et seq.*

15. See 1994 Cal. Stat. ch. 307; 1995 *Comprehensive Power of Attorney Law*, 24 Cal. L. Revision Comm'n Reports 323 (1994).

16. *Id.* at 335.

POWER OF ATTORNEY FOR HEALTH CARE

The proposed Health Care Decisions Law continues and recasts the existing law governing the durable power of attorney for health care, including the statutory form durable power of attorney for health care.¹⁷ For the well-advised or careful individual who is making sensible arrangements for the time when he or she may be incapacitated, the power of attorney for health care¹⁸ is clearly the best approach. Expressing one's desires about health care and naming one or more agents¹⁹ subject to appropriate standards is the best way to accomplish "incapacity planning" and seek to effectuate a person's intent with regard to health care decisions, especially with regard to life-sustaining treatment.

In the new terminology — not so new in practice, but new to the Probate Code — a power of attorney for health care is one type of "advance health care directive" (or "advance directive").²⁰ The proposed law restructures the power of

17. For the central provisions governing the durable power of attorney for health care, see Prob. Code §§ 4600-4752. For the statutory form durable power of attorney for health care, see Prob. Code §§ 4770-4779.

18. For convenience, the proposed law uses the term "power of attorney for health care" instead of "durable power of attorney for health care." The reference to durability was more important in earlier years, when the idea of an agency surviving the incapacity of the principal was still a novel concept. The principle of durability should now be clear and, in any event, in the realm of health care decisionmaking, it is common sense that almost all powers of attorney for health care will operate only after the principal becomes incapable of making health care decisions. The durability feature is clear in the proposed law, notwithstanding the omission of the term "durable."

19. The proposed law uses the more "user-friendly" term "agent" in place of "attorney-in-fact" used in the existing durable power of attorney for health care statute. However, the terms are interchangeable, as provided in existing law (Prob. Code § 4014(a)) and in the proposed law (proposed Prob. Code § 4607(a)).

20. The comment to UHCDA Section 1(1) notes that the term "appears in the federal Patient Self-Determination Act enacted as sections 4206 and 4751 of the Omnibus Budget Reconciliation Act of 1990 and has gained widespread usage among health-care professionals."

attorney for health care provisions based on a mix of principles from the existing Power of Attorney Law and the Uniform Health-Care Decisions Act. Where rules apply only to powers of attorney for health care, the proposed law uses that terminology. Where rules apply to all written advance health care directives, the language will vary, but the general substance of the law continues, except as noted.

Execution Formalities

The original durable power of attorney for health care was subject to a number of restrictions that are now considered to be overly protective. When first enacted, the durable power of attorney for property was only valid for a year following the principal's incapacity.²¹ The original durable power of attorney for health care expired after seven years, except when the expiration date fell in a time of incapacity.²² These restrictive rules may have had a role to play when the concepts were new, but were abandoned as the law progressed and the concepts and instruments became familiar.

Now it is recognized that overly restrictive execution requirements for powers of attorney for health care unnecessarily impede the effectuation of intent. The progression from more restrictive execution requirements to more intent-promoting provisions can also be seen in the development of the Uniform Health-Care Decisions Act. The original Uniform Rights of the Terminally Ill Act of 1985 (URTIA), based in part on the 1976 California Natural Death Act, required two witnesses.²³ The Uniform Health-Care Decisions Act, which

21. 1979 Cal. Stat. ch. 234 (enacting Civ. Code § 2307.1, repealed by 1981 Cal. Stat. ch. 511, § 1).

22. See former Civ. Code § 2436.5, as enacted by 1983 Cal. Stat. ch. 1204, § 10. See also Prob. Code § 4654 (transitional provision concerning former seven-year powers). The proposed law does not provide any special rules for these earlier powers. See *infra* text accompanying note 91.

23. URTIA § 2. The 1989 revision of URTIA continued this requirement.

is intended to replace URTIA, adopts the principle that no witnesses should be required in a power of attorney for health care, although witnessing is encouraged, and places signatures of witnesses are provided on the statutory form.²⁴ As a general rule, the proposed law also adopts this principle in place of the existing requirement of two witnesses or notarization.²⁵

Witnessing can be useful, however, even if it is not required. The proposed law follows the UHCDA in recommending but not requiring witnesses. Witness requirements can operate as more of an intent-defeating technicality than a protection against possible fraud.²⁶ The drafters of the UHCDA viewed technical execution formalities as unnecessarily inhibiting while at the same time doing “little, if anything, to prevent fraud or enhance reliability.”²⁷ The genuineness of advance health care directives is bolstered by placing reliance on the health care providers. Recordkeeping plays a critical role. Health care providers are required to enter the advance directive in the patient’s health care records. Medical ethics also reinforce the duty to determine and effectuate genuine intent. The proposed law also provides penalties for violation of statutory duties.²⁸

24. UHCDA § 2(b).

25. Prob. Code §§ 4121-4122, 4700-4701. The existing statutory form power of attorney for health care must be witnessed; it is not validated by notarization. Prob. Code § 4771 & Comment.

26. This is not to say that more formal requirements are not important in powers of attorney for property, where the possibility of fraud is more significant. The execution formalities in the Power of Attorney Law applicable to non-health care powers of attorney would continue to apply. See Prob. Code §§ 4121 (formalities for executing a power of attorney), 4122 (requirements for witnesses).

27. English & Meisel, *Uniform Health-Care Decisions Act Gives New Guidance*, Est. Plan. 355, 358-59 (Dec. 1994).

28. See *infra* text accompanying notes 69-72.

However, there are circumstances where additional protections are necessary. The proposed law continues the special rules applicable to executing a power of attorney for health care by a patient in a skilled nursing facility.²⁹ These restrictions are also applied to other written advance directives, i.e., individual health care instructions expressing treatment preferences that do not appoint an agent.

The proposed law dispenses with the statutory requirement that a power of attorney for health care state the date of its execution.³⁰ Including a date is certainly the best practice, and the statutory form provides a space for the date. However, requiring a date can defeat accomplishment of the patient's wishes, if the consequence of omission is to invalidate the advance directive. Although dating important documents is desirable, the law does not require either wills or trusts to be dated.³¹

Statutorily Required Warnings

Existing law provides a number of "warnings" that must be included depending on whether a form durable power of attorney for health care is on a printed form, drawn from the statutory form, or individually drafted by an attorney or someone else.³² There is an important alternative to comply-

29. See Prob. Code §§ 4121-4122, 4701.

30. See Prob. Code § 4121(a). The dating requirement originated in former Civil Code Section 2432(a)(2) (1983 Cal. Stat. ch. 1204, § 10). The provision originally provided that an agent "may not make health care decisions unless ... [t]he durable power of attorney contains the date of its execution." Probate Code Section 4121 now provides that the power of attorney "is legally sufficient" if the stated requirements are satisfied. Thus, the statute does not explicitly invalidate a power of attorney that does not include a date, as did the 1983 statute.

31. See Prob. Code §§ 6110 (wills), 15200 *et seq.* (trusts).

32. See Prob. Code §§ 4703 (requirements for printed form), 4704 (warnings in power of attorney for health care not on printed form), 4771 (statutory form), 4772 (warning or lawyer's certificate), 4774 (requirements for statutory form).

ing with the strict execution requirements in California law. The law recognizes the validity of durable powers of attorney for health care and similar instruments executed in another state or jurisdiction in compliance with their law.³³

The existing warning provisions are confusing and rigid. While there has been an attempt to educate potential users through concise and simple statements, the net effect of the existing scheme may have been to inhibit usage. Some form of introductory explanation is still needed, however, and the optional statutory form drawn from the UHCDA in the proposed law fulfills this purpose. But the proposed law no longer attempts to instruct lawyers on how to advise their clients. The Commission expects that those who prepare printed forms will copy the language of the optional form or use a reasonable equivalent without the need to mandate specific language in the statute.

Revocation

A durable power of attorney for health care under existing law can be revoked expressly in writing or by notifying the health care provider orally or in writing, but it is also revoked by operation of law if the principal executes a later power of attorney for health care.³⁴ This last rule provides administrative simplicity, since a comparison of dates would show which power was in force. Unfortunately, it is also a trap, since a principal may attempt to amend or clarify an earlier power, or designate a new attorney-in-fact, in ignorance of the rule and inadvertently wipe out important instructions. It is also quite difficult to implement this all-or-nothing rule in

For a number of complicated, technical rules governing earlier printed form requirements, see Prob. Code §§ 4651, 4775.

33. Prob. Code § 4653. A similar rule applies under Health and Safety Code Section 7192.5 in the NDA.

34. Prob. Code § 4727(a), (b), (d).

the context of a broader statute permitting written individual health care instructions and direct surrogate designations.

A better approach is adopted in the proposed law, based on the UHCDA.³⁵ The intentional revocation rule is similar: a patient with capacity can revoke a designation of an agent only by a signed writing or by personally informing the supervising health care provider; individual health care instructions can be revoked in any manner communicating an intent to revoke. The distinct treatment of agent designations and health care instructions is justified because the patient should have only one agent at a time, and a revocation should be clear and evidenced, whereas health care instructions do not share this feature and can be revised and supplemented without any inherent restriction. Recognizing this practical reality, a later advance directive revokes a prior directive only to the extent of the conflict, thus promoting the fundamental purpose of implementing the patient's intent.

The proposed law continues the existing rule that a person's designation of his or her spouse as agent to make health care decisions is revoked if the marriage is dissolved or annulled.³⁶

INDIVIDUAL HEALTH CARE INSTRUCTIONS

California does not authorize what the UHCDA calls an "individual instruction," other than through the mechanism of the Natural Death Act, which applies only to patients in a terminal or permanent unconscious condition. Health care instructions may, of course, be given in the context of appointing and instructing an attorney-in-fact under a durable

35. UHCDA § 3.

36. Prob. Code § 4727(e). The designation is revived if the principal and the former spouse are remarried, consistent with other statutes. See Prob. Code §§ 78(a) (definition of "surviving spouse"), 4154(b) (powers of attorney generally), 6122(b) (wills), 6227(a) (statutory will).

power of attorney for health care. The Commission is informed that, in practice, individuals will execute a durable power of attorney for health care *without* appointing an attorney-in-fact so that they can use that vehicle to effectively state their health care instructions. It is also possible to appoint an attorney-in-fact, but limit the agent's authority while expressing broad health care instructions. These approaches may succeed in getting formal health care instructions into the patient's record, but existing law is not well-adapted for this purpose. Health care providers' duties under the existing durable power of attorney for health care focus on the *agent's* decisions, not the *principal's* instructions.

The proposed law adopts the UHCDA's broader concept of authorizing individual health care instructions. This makes the law clearer, more direct, and easier to use. The option of giving independent health care instructions is also implemented as part of the optional statutory form. Using the simple and relatively short statutory form will enable an individual to record his or her preferences concerning health care or to select an agent, or to do both.

STATUTORY SURROGATES — FAMILY CONSENT

Most incapacitated adults for whom health care decisions need to be made will not have formal written advance health care directives. It is likely that less than one-fifth of adults have executed written advance health care directives.³⁷ The law, focusing as it does on execution of advance directives, is deficient if it does not address the health care decisionmaking process for the great majority of incapacitated adults who have not executed written advance directives.

37. See *supra* note 10.

Existing California Law

California statutory law does not provide general rules governing surrogate decisionmaking. However, in the nursing home context, the procedure governing consent to “medical interventions” implies that the “next of kin” can make decisions for incapacitated persons by including them in the group of persons “with legal authority to make medical treatment decisions on behalf of a patient.”³⁸

There are supportive statements in case law, but due to the nature of the cases, they do not provide comprehensive guidance as to who can make health care decisions for incapacitated persons. For example, in *Cobbs v. Grant*, the Supreme Court wrote:

A patient should be denied the opportunity to weigh the risks only where it is evident he cannot evaluate the data, as for example, where there is an emergency or the patient is a child or incompetent. For this reason the law provides that in an emergency consent is implied . . . , and if the patient is a minor or incompetent, the authority to consent is transferred to the patient’s legal guardian or closest available relative In all cases other than the foregoing, the decision whether or not to undertake treatment is vested in the party most directly affected: the patient.³⁹

But this language is not a holding of the case.⁴⁰

The leading case of *Barber v. Superior Court*⁴¹ contains a thorough discussion of the problems:

38. Health & Safety Code § 1418.8(c).

39. 8 Cal. 3d 229, 243-44, 502 P.2d 1, 104 Cal. Rptr. 505 (1972) (citations omitted).

40. The “closest available relative” statement cites three cases, none of which involve incapacitated adults. Consent on behalf of an incapacitated adult was not an issue in the case, since the patient did not lack capacity, but was claiming that he had not given informed consent. Still, *Cobbs* is cited frequently in later cases involving consent or withdrawal of consent to medical treatment.

41. 147 Cal. App. 3d 1006, 1020-21, 195 Cal. Rptr. 484 (1983).

Given the general standards for determining when there is a duty to provide medical treatment of debatable value, the question still remains as to who should make these vital decisions. Clearly, the medical diagnoses and prognoses must be determined by the treating and consulting physicians under the generally accepted standards of medical practice in the community and, whenever possible, the patient himself should then be the ultimate decision-maker.

When the patient, however, is incapable of deciding for himself, because of his medical condition or for other reasons, there is no clear authority on the issue of who and under what procedure is to make the final decision.

It seems clear, in the instant case, that if the family had insisted on continued treatment, petitioners would have acceded to that request. The family's decision to the contrary was, as noted, ignored by the superior court as being a legal nullity.

In support of that conclusion the People argue that only duly appointed legal guardians have the authority to act on behalf of another. While guardianship proceedings might be used in this context, we are not aware of any authority *requiring* such procedure. In the case at bench, petitioners consulted with and relied on the decisions of the immediate family, which included the patient's wife and several of his children. No formal guardianship proceedings were instituted.

....

The authorities are in agreement that any surrogate, court appointed or otherwise, ought to be guided in his or her decisions first by his knowledge of the patient's own desires and feelings, to the extent that they were expressed before the patient became incompetent....

If it is not possible to ascertain the choice the patient would have made, the surrogate ought to be guided in his decision by the patient's best interests. Under this standard, such factors as the relief of suffering, the preservation or restoration of functioning and the quality as well as the extent of life sustained may be considered. Finally, since most people are concerned about the well-being of their loved ones, the surrogate may take into account the impact of the decision on those people closest to the patient....

There was evidence that Mr. Herbert had, prior to his incapacitation, expressed to his wife his feeling that he would not want to be kept alive by machines or “become another Karen Ann Quinlan.” The family made its decision together (the directive to the hospital was signed by the wife and eight of his children) after consultation with the doctors.

Under the circumstances of this case, the wife was the proper person to act as a surrogate for the patient with the authority to decide issues regarding further treatment, and would have so qualified had judicial approval been sought. There is no evidence that there was any disagreement among the wife and children. Nor was there any evidence that they were motivated in their decision by anything other than love and concern for the dignity of their husband and father.

Furthermore, in the absence of legislative guidance, we find no legal requirement that prior judicial approval is necessary before any decision to withdraw treatment can be made.

Despite the breadth of its language, *Barber* does not dispose of the issue of who can consent, due to the way in which the case arose — reliance on requests from the family of the patient as a defense to a charge of murder against the doctors who removed the patient’s life support. Note also that the court is not in a position to determine issues such as who is included in the patient’s “family.” It is implicit in the case that the wife, children, and sister-in-law were all family members. However, the court’s statement that the “wife was the proper person to act as a surrogate for the patient” based on the assumption she would have been qualified if judicial approval had been sought, is not completely consistent with other statements referring to the “family’s decision” and that the “wife and children were the most obviously appropriate surrogates,” and speculation on what would have happened if “the family had insisted on continued treatment.”

Nevertheless, *Barber* has been characterized as an “enormously important” decision: “Indeed, literature gener-

ated from within the medical community indicates that health care providers rely upon *Barber* — presumably every day — in deciding together with families to forego treatment for persistently vegetative patients who have no reasonable hope of recovery.”⁴²

Current Practice: LACMA-LACBA Pamphlet

In the mid-1980s, the Joint Committee on Biomedical Ethics of the Los Angeles County Medical Association (LACMA) and Los Angeles County Bar Association (LACBA) issued and has since updated a pamphlet entitled “Guidelines: Forgoing Life-Sustaining Treatment for Adult Patients.” It is expected that the *Guidelines* are widely relied on by medical professionals and are an important statement of custom and practice in California. The *Guidelines* were cited in *Bouvia* and *Drabick*. A 1993 addendum to the *Guidelines*, pertaining to decisionmaking for incapacitated patients without surrogates, provides a concise statement of the “Relevant Legal and Ethical Principles”:

The process suggested in these Guidelines has been developed in light of the following principles established by the California courts and drawn from the Joint Committee’s Guidelines for Forgoing Life-Sustaining Treatment for Adult Patients:

(a) Competent adult patients have the right to refuse treatment, including life-sustaining treatment, whether or not they are terminally ill.

(b) Patients who lack capacity to make healthcare decisions retain the right to have appropriate medical decisions made on their behalf, including decisions regarding life-sustaining treatment. An appropriate medical decision is one that is made in the best interests of the patient, not the hospital, the physician, the legal system, or someone else.

42. Conservatorship of *Drabick*, 200 Cal. App. 3d 185, 198, 245 Cal. Rptr. 840 (1988).

(c) A surrogate decision-maker is to make decisions for the patient who lacks capacity to decide based on the expressed wishes of the patient, if known, or based on the best interests of the patient, if the patient's wishes are not known.

(d) A surrogate decision-maker may refuse life support on behalf of a patient who lacks capacity to decide where the burdens of continued treatment are disproportionate to the benefits. Even a treatment course which is only minimally painful or intrusive may be disproportionate to the potential benefits if the prognosis is virtually hopeless for any significant improvement in the patient's condition.

(e) The best interests of the patient do not require that life support be continued in all circumstances, such as when the patient is terminally ill and suffering, or where there is no hope of recovery of cognitive functions.

(f) Physicians are not required to provide treatment that has been proven to be ineffective or will not provide a benefit.

(g) Healthcare providers are not required to continue life support simply because it has been initiated.

Current Practice: Patient Information Pamphlet

A patient information pamphlet ("Your Right To Make Decisions About Medical Treatment") has been prepared by the California Consortium on Patient Self-Determination and adopted by the Department of Health Services for distribution to patients at the time of admission. This is in compliance with the federal Patient Self-Determination Act of 1990. The PSDA requires the pamphlet to include a summary of the state's law on patients' rights to make medical treatment decisions and to make advance directives. The California pamphlet contains the following statement:

What if I'm too sick to decide?

If you can't make treatment decisions, your doctor will ask your closest available relative or friend to help decide what is best for you. Most of the time, that works. But sometimes everyone doesn't agree about what to do. That's

why it is helpful if you say in advance what you want to happen if you can't speak for yourself. There are several kinds of "advance directives" that you can use to say *what* you want and *who* you want to speak for you.

Based on the case law, the Commission is not confident that California law says the *closest* available relative *or friend* can make health care decisions. However, it is likely in practice that these are the persons doctors will ask, as stated in the pamphlet.⁴³

Alternative Approaches to Statutory Surrogate Priorities

The general understanding is that close relatives and friends who are familiar with the patient's desires and values should make health care decisions in consultation with medical professionals. Wives, brothers, mothers, sisters-in-law, and domestic partners have been involved implicitly as "family" surrogate decisionmakers in reported California cases. The practice, as described in authoritative sources, is consistent with this understanding. Courts and legislatures nationwide naturally rely on a family or next-of-kin approach because these are the people who are presumed to best know the

43. See also American Medical Ass'n, Code of Medical Ethics § 2.20, at 40 (1997-98) ("[W]hen there is no person closely associated with the patient, but there are persons who both care about the patient and have sufficient relevant knowledge of the patient, such persons may be appropriate surrogates."); California Healthcare Ass'n, Consent Manual: A Reference for Consent and Related Health Care Law 2-18 (23d ed. 1996) ("In some circumstances, it may be necessary or desirable to rely upon the consent given by the incompetent patient's 'closest available relative.' The validity of such consent cannot be stated with certainty, but the California Supreme Court has indicated that in some cases it is appropriate for a relative to give consent." [citing *Cobbs v. Grant*]); President's Comm'n etc., Deciding To Forego Life-Sustaining Treatment 126-27 (1983) ("When a patient lacks the capacity to make a decision, a surrogate decisionmaker should be designated. Ordinarily this will be the patient's next of kin, although it may be a close friend or another relative if the responsible health care professional judges that this other person is in fact the best advocate for the patient's interests.").

desires of the patient and to determine the patient's best interests.⁴⁴

Priority schemes among relatives and friends seem natural. Intestate succession law⁴⁵ provides a ready analogy — thus, the spouse, children, parents, siblings, and so forth, seem to be a natural order. The same order is established in the preference for appointment as conservator.⁴⁶ But the analogy between health care, life-sustaining treatment, and personal autonomy, on one hand, and succession to property, on the other, is weak. A health care decision cannot be parceled out like property in an intestate's estate. The consequences of a serious health care decision are different in kind from decisions about distributing property.

The trend in other states is decidedly in favor of providing statutory guidance, generally through a priority scheme. The collective judgment of the states would seem to be that, since most people will not execute any form of advance directive, the problem needs to be addressed with some sort of default rules, perhaps based on an intestate succession analogy. As described by Professor Meisel:⁴⁷

The primary purpose of these statutes is to make clear what is at least implicit in the case law: that the customary medical professional practice of using family members to make decisions for patients who lack decisionmaking capacity and who lack an advance directive is legally valid, and that ordinarily judicial proceedings need not be initiated for the appointment of a guardian. Another purpose of these statutes is to provide a means, short of cumbersome and possibly expensive guardianship proceedings, for designating a surrogate decisionmaker when the patient has no close family members to act as surrogate.

44. See generally 2 A. Meisel, *The Right to Die* §§ 14.1-14.10 (2d ed. 1995).

45. Prob. Code § 6400 *et seq.*

46. Prob. Code § 1812.

47. 2 A. Meisel, *The Right to Die* § 14.1, at 249-50 (2d ed. 1995).

The UHCDA scheme lists the familiar top four classes of surrogates (spouse, children, parents, siblings), but is less restrictive than many state statutes in several respects:⁴⁸

(1) Class members *may* act as surrogate and need to *assume authority* to do so. It is not clear whether a class member must affirmatively decline to act or may be disregarded if he or she fails to assume authority, but unlike some state statutes, an abstaining class member does not prevent action.

(2) Determinations within classes can be made by majority vote under the UHCDA. This is not likely to be a common approach to making decisions where there are disagreements, but could be useful to validate a decision of a majority where there are other class members whose views are unknown or in doubt.

(3) Orally designated surrogates are first on the UHCDA priority list, in an attempt to deal with the fact that a strict statutory priority list does not necessarily reflect reality. The “orally designated surrogate was added to the Act not because its use is recommended but because it is how decision makers are often designated in clinical practice.”⁴⁹

(4) The authorization for adults who have “exhibited special care and concern” is relatively new. Under the common law, the status of friends as surrogates is, in Professor Meisel’s words, “highly uncertain.”⁵⁰ In a special procedure applicable

48. UHCDA § 5.

49. English, *Recent Trends in Health Care Decisions Legislation* 17 (1998) (unpublished manuscript, on file with California Law Revision Commission).

50. 2 A. Meisel, *The Right to Die* §14.4, at 51 (2d ed. Supp. #1 1997). *But cf.* *Conservatorship of Drabick*, 200 Cal. App. 3d 185, 204, 245 Cal. Rptr. 840 (1988) (“[F]aced with a persistently vegetative patient and a diagnosis establishing that further treatment offers no reasonable hope of returning the patient to cognitive life, the decision whether to continue noncurative treatment is an ethi-

to “medical interventions” in nursing homes, California law requires consultation with friends of nursing home patients and authorizes a friend to be appointed as the patient’s representative,⁵¹ but the health care decision is made by an “interdisciplinary team.”

Statutory Surrogates Under Proposed Law

The Commission concludes that a rigid priority scheme based on an intestate succession analogy would be too restrictive and not in accord with the fundamental principle that decisions should be based on the patient’s desires or, where not known, should be made in the patient’s best interest. The focus of statutory surrogacy rules should be to provide some needed clarity without creating technical rules that would make compliance confusing or risky, thereby bogging the process down or paralyzing medical decisionmaking. Just as California courts have consistently resisted judicial involvement in health care decisionmaking, except as a last resort, the statutory surrogacy scheme should assist, rather than disrupt, existing practice.

Professor Meisel describes this fundamental problem with priority classes as follows:⁵²

Although the intent of such priority lists is a good one — to eliminate possible confusion about who has the legal authority to make decisions for incompetent patients — the result of surrogate-designation pursuant to statute is not only mechanical but can be contrary or even inimical to the

cal one for the physicians and family members or other persons who are making health care decisions for the patient.”).

51. Health & Safety Code § 1418.8. For the purposes of this section, subdivision (c) lists “next of kin” as a person with “legal authority to make medical treatment decisions.” See also *Rains v. Belshé*, 32 Cal. App. 4th 157, 166, 38 Cal. Rptr. 2d 185 (1995) (upholding the procedure and citing with approval the duty to consult with friends and the participation of the patient representative).

52. 2 A. Meisel, *The Right to Die* § 14.4 at 255 (2d ed. 1995) (footnotes omitted).

patient's wishes or best interests. This would occur, for example, if the patient were estranged from his spouse or parents. However, it is not clear that the result would be much different in the absence of a statute because the ordinary custom of physicians sanctioned by judicial decision, is to look to incompetent patients' close family members to make decisions for them. In the absence of a statute, the physician might ignore a spouse known to be estranged from the patient in favor of another close family member as surrogate, but because there is nothing in most statutes to permit a physician to ignore the statutory order of priority, the result could be worse under a statute than in its absence.

In recognition of the problems as well as the benefits of a priority scheme, the proposed law sets out a default list of adult statutory surrogates: (1) The spouse, unless legally separated, (2) a domestic partner,⁵³ (3) children, (4) parents, (5) brothers and sisters, (6) grandchildren, and (7) close friends.

As a general rule, the primary physician is required to select the surrogate, with the assistance of other health care providers or institutional committees, in the order of priority set out in the statute. However, where there are multiple possible surrogates at the same priority level, the primary physician has a duty to select the individual who reasonably appears after a good faith inquiry to be best qualified.⁵⁴ The primary physician may select as the surrogate an individual who is positioned lower in statutory list if, in the primary physician's judgment, the individual is best qualified to serve

53. Proposed Probate Code Section 4712(a)(2) defines this class as follows: "An adult in a long-term relationship of indefinite duration with the patient in which the individual has demonstrated an actual commitment to the patient similar to the commitment of a spouse and in which the individual and the patient consider themselves to be responsible for each other's well-being and reside or have been residing together...."

54. The recommended procedure is drawn, in part, from West Virginia law. See W.Va. Code § 16-30B-7 (Westlaw 1999). Elements are also drawn from New Mexico's implementation of the UHCDA. See N.M. Stat. Ann. § 24-7A-5 (Westlaw 1998).

as the patient's surrogate. These rules are directly related to the fundamental principal that the law should attempt to find the best surrogate — the person who can make health care decisions according to the patient's known desires or in the patient's best interest.

Providing flexibility based on fundamental principles of self-determination and ethical standards ameliorates the defects of a rigid priority scheme. The procedure for varying the default priority rules is not arbitrary, but subject to a set of important statutory standards. In determining which listed person is best qualified to serve as the surrogate, the following factors must be considered:

- (1) Whether the proposed surrogate appears to be best able to make decisions in accordance with the statutory standard (patient's instructions, if known, or if not known, patient's best interest, taking into account personal values).
- (2) The degree of the person's regular contact with the patient before and during the patient's illness.
- (3) Demonstrated care and concern for the patient.
- (4) Familiarity with the patient's personal values.
- (5) Availability to visit the patient.
- (6) Availability to engage in face-to-face contact with health care providers for the purpose of fully participating in the health care decisionmaking process.

In addition, the process of applying these standards and making the determination must be documented in the patient's medical record. The surrogate is required to communicate his or her assumption of authority to other family members, including the spouse, domestic partner, adult children, parents, and adult siblings of the patient.

The recommended procedure also reduces the problem of resolving differences between potential surrogates. There can be problems under the existing state of law and custom, as illustrated by cases where family members — e.g., children, parents, or the patient's spouse — compete for appointment

as conservator of an incapacitated person. These disputes will still occur and it is difficult to imagine a fair and flexible statutory procedure that could resolve all issues.

As discussed, the UHCDA provides a fixed priority scheme between classes of close relatives and provides for voting within a class with multiple members.⁵⁵ If a class is deadlocked, then the surrogacy procedure comes to a halt; lower classes do not get an opportunity to act, although it is possible for a higher class to reassert its priority, and the evenly split class could resolve the deadlock over time. This type of procedure seems overly mechanical and lacking in needed flexibility.

The Commission also considered a family consensus approach, such as that provided under Colorado law.⁵⁶ In this procedure, the class of potential surrogates, composed of close family members and friends, is given the responsibility and duty to select a surrogate from among their number. It is difficult to judge how well this type of procedure would work in practice. The concern is that it might result in too much confusion and administrative burden, without improving the prospects for effective decisionmaking or resolving disputes. But there is nothing in the proposed law that would prevent a family from voluntarily acting in this fashion, and it is likely that the selected surrogate would satisfy the standards of the flexible priority scheme.

The proposed law adopts a presumptive “pecking order” like the UHCDA, but places the responsibility on the primary physician to select the best-situated person based on standards set out in the statute. This avoids the rigidity of the UHCDA approach and the indefiniteness and administrative burden of

55. UHCDA § 5.

56. See Colo. Rev. Stat. Ann. § 15-18.5-103 (West 1997). Illinois and Louisiana also implement some consensus standards. See generally, 2 A. Meisel, *The Right to Die* § 14.1 *et seq.* (2d ed. 1995 & Supp. #1 1997).

the consensus approach. Notice of the selection should be given to other family members. The surrogate is required to communicate the assumption of surrogate's authority to other adults in the first five categories of statutory surrogates: spouse, domestic partner, children, parents, and siblings. Potential surrogates or other interested persons with serious objections to the selection of the surrogate or the decisions being made by the surrogate would still have the right to bring a judicial challenge⁵⁷ or seek appointment of a conservator.

Like the UHCDA, the proposed law gives priority over the statutory list to a surrogate who has been designated by the patient.

DECISIONMAKING WHERE NO SURROGATE IS AVAILABLE

The law does not address one of the most important problems if it stops at providing rules on advance directives and "family consent." The statutory surrogate rules will not apply to a significant group of incapacitated adults for whom there are no potential surrogates because they have no close relatives or friends familiar with their health care treatment desires or values, or because potential surrogates are unwilling or unable to make decisions. While the conservatorship statutes provide a remedy of last resort, practically speaking, the conservatorship rules can be cumbersome, inefficient, and expensive, and do not provide the answer in most cases.

Existing law addresses this problem with respect to "medical interventions" involving patients in the nursing home context,⁵⁸ but there is no general surrogacy rule appli-

57. See *infra* text accompanying notes 77-80.

58. Health & Safety Code § 1418.8. See *Rains v. Belshé*, 32 Cal. App. 4th 157, 166, 170, 38 Cal. Rptr. 2d 185 (1995) (upholding the constitutionality of the procedure for patients in nursing homes who lack capacity to make health

cable in these circumstances. The UHCDA does not address this problem.

The alternative of appointing a conservator of the person in each of these cases is not an adequate solution to the problem, as recognized by the Legislature when it enacted the nursing home medical intervention procedure.⁵⁹ While it is possible to seek court approval for medical “treatment” under Probate Code Section 3200 *et seq.* (authorization of medical treatment for adult without conservator), this procedure does not explicitly authorize orders for *withdrawal* of treatment or *refusal* of consent.⁶⁰

The proposed law adopts a procedure based in large part on the nursing home medical intervention procedure, but with some important additional protections. Under this proposal, health care decisions for the “friendless” incapacitated adult could be made by a “surrogate committee.” It is expected that hospitals and nursing homes will establish a surrogate committee, to take advantage of the statute. In a situation where there is no institutionally founded surrogate committee, or in the rare case where a health care decision needs to be made and there is no institution involved, the proposed law grants authority to the county health officer or county supervisors to establish a surrogate committee.

The basic committee would be made up of the following three persons:

- (1) The patient’s primary physician.

care decisions, “even though they do not have a next of kin, an appointed conservator, or another authorized decision maker to act as their surrogate”).

59. In most cases, the conservator will be the Public Guardian, which may be a non-solution if the Public Guardian’s policy is not to exercise the duty to decide as set down in *Drabick* and make an individualized assessment for each patient.

60. Probate Code Section 3208 refers to “authorizing the recommended course of medical treatment of the patient” and “the existing or continuing medical condition.”

(2) A professional nurse with responsibility for the patient and with knowledge of the patient's condition.

(3) A patient representative or community member. The patient representative may be a family member or friend of the patient who is unable to take full responsibility for the patient's health care decisions, but has agreed to serve on the surrogate committee. A community member is an adult who is not employed by or regularly associated with the primary physician, the health care institution, or employees of the health care institution.

But in cases involving withholding or withdrawing life-sustaining treatment or other critical health care decisions, the surrogate committee would also be required to include a member of the health care institution's ethics committee or an outside ethics consultant.

The surrogate committee under the proposed law is intended to require the degree of expertise and participation appropriate to the type of health care decision that needs to be made. The proposal provides *minimum* guidelines and is not intended to restrict participation by other appropriate persons, including health care institution staff in disciplines as determined by the patient's needs. The participation of the institutional ethics committee or an outside ethics consultant conforms to the best practice in life-sustaining treatment situations. The inclusion of outside representatives (the patient representative or community member) and, in critical cases, an ethics advisor, provides important protections that are not applicable under the existing nursing home medical intervention scheme.

In reviewing proposed health care decisions, the surrogate committee would be required to consider and review all of the following factors:

- (1) The primary physician's assessment of the patient's condition.
- (2) The reason for the proposed health care decision.

(3) The desires of the patient, if known. To determine the desires of the patient, the surrogate committee must interview the patient, review the patient's medical records, and consult with family members or friends, if any have been identified.

(4) The type of health care to be used in the patient's care, including its probable frequency and duration.

(5) The probable impact on the patient's condition, with and without the use of the proposed health care.

(6) Reasonable alternative health care decisions considered or utilized, and reasons for their discontinuance or inappropriateness.

The surrogate committee is required to evaluate the results of approved health care decisions periodically, as appropriate under applicable standards of care.

The proposed law intends the surrogate committee to try to operate on a consensus basis. If consensus cannot be reached, the committee is authorized to approve proposed health care decisions by majority vote. There is an important exception: health care decisions relating to withholding or withdrawing life-sustaining treatment cannot be implemented if any member of the surrogate committee is opposed. If a surrogate committee becomes hopelessly deadlocked, resort to judicial proceedings may be necessary.

STANDARDS FOR SURROGATE DECISIONMAKING

The existing power of attorney for health care law requires the attorney-in-fact to "act consistent with the desires of the principal as expressed in the durable power of attorney or otherwise made known to the attorney-in-fact at any time or, if the principal's desires are unknown, to act in the best interests of the principal."⁶¹

The UHCDA adopts the same rule as a general standard for all surrogates:

61. Prob. Code § 4720(c).

[T]he Act seeks to ensure to the extent possible that decisions about an individual's health care will be governed by the individual's own desires concerning the issues to be resolved. The Act requires an agent or surrogate authorized to make health-care decisions for an individual to make those decisions in accordance with the instructions and other wishes of the individual to the extent known. Otherwise, the agent or surrogate must make those decisions in accordance with the best interest of the individual but in light of the individual's personal values known to the agent or surrogate. Furthermore, the Act requires a guardian to comply with a ward's previously given instructions and prohibits a guardian from revoking the ward's advance health-care directive without express court approval.

The proposed law, like the UHCDA, applies these standards generally throughout the statute. Thus, the same fundamental standard will apply to all surrogate health care decision-makers: agents under powers of attorney, surrogates designated by the patient, family and friends who can act as surrogates under general principles codified in the statutory surrogate rules, surrogate committees acting for the "friendless" patient, private conservators and Public Guardians acting for conservatees without the capacity to make health care decisions,⁶² and courts deciding cases under the court-authorized health care procedure.⁶³

DUTIES OF HEALTH CARE PROVIDERS AND OTHERS

The proposed law sets out a number of specific duties of health care providers, drawn from the UHCDA,⁶⁴ that are more detailed than existing law. A fundamental feature of the uniform act is reliance on health care professionals to make necessary determinations and to comply with advance direc-

62. See *infra* text accompanying notes 84-87.

63. See *infra* text accompanying notes 81-83.

64. UHCDA § 7.

tives and health care decisions made by surrogates. Thus, the proposed law requires communication with the patient, entry in the patient's medical records of the existence of an advance directive (including a copy) or a surrogate designation, and of any revocation or modification. The recordkeeping duties are extremely important since, in the clinical setting, the patient's records provide the best means to make advance directives and surrogate designations effective.

The proposed law requires the health care provider and institution to comply with the patient's advance directive, and with health care decisions made by the patient's surrogate decisionmaker, to the same extent as if the patient made the decision while having capacity.⁶⁵ However, a health care provider may lawfully decline to comply for reasons of conscience or institutional policy. This rule, drawn from the UHCDA,⁶⁶ is consistent with the Natural Death Act and case law.⁶⁷ If the health care provider declines to comply, however, there is a duty to transfer the patient to another health care institution.

Another important limitation on the health care provider's duty to comply is recognized in the proposed law. The health care provider or institution may decline to provide medically ineffective care or care that is contrary to generally accepted health care standards.⁶⁸ As in other cases where compliance can be refused, the health care provider and institution have a duty to provide continuing care until a transfer can be accomplished or until it appears that a transfer cannot be

65. These duties are not specified, although they are implicit, in the existing law on durable powers of attorney for health care. See Prob. Code § 4720. A duty to comply with a directive or transfer the patient is provided in the Natural Death Act. See Health & Safety Code § 7187.5 (2d sentence).

66. UHCDA § 7(e).

67. Health & Safety Code § 7190; *Conservatorship of Morrison*, 206 Cal. App. 3d 304, 310-12, 253 Cal. Rptr. 530 (1988).

68. This is drawn from UHCDA Section 7(f).

accomplished. But in all cases, appropriate palliative care must be provided.

LIABILITIES OF HEALTH CARE PROVIDERS AND OTHERS

The existing law governing durable powers of attorney for health care provides protection from criminal prosecution, civil liability, and professional disciplinary action for health care providers who in good faith rely on the decision of an attorney-in-fact in circumstances where in good faith the health care provider believes the decision is consistent with the desires and best interests of the principal.⁶⁹ Similarly, the Natural Death Act protects health care providers who comply with a declaration in good faith and in accordance with reasonable medical standards.⁷⁰

The proposed law combines and generalizes these rules, in a form drawn from the UHCDA.⁷¹ Health care providers and institutions are protected for actions taken under the law if they act in good faith and in accordance with generally accepted health care standards applicable to them. Specifically listed are compliance with a health care decision by a person apparently having authority to make the decision, declining to comply where a person does not appear to have authority, and complying with an advance directive assumed to be validly executed and not revoked.

The proposed law provides new statutory penalties, based on the UHCDA,⁷² for intentional violation of the law in the amount of \$2500 or actual damages, whichever is greater, plus attorney's fees. Any person who intentionally forges,

69. Prob. Code § 4750.

70. Health & Safety Code § 7190.5.

71. UHCDA § 9(a).

72. UHCDA § 10.

conceals, or destroys an advance directive or revocation without consent, or who coerces or fraudulently induces a person to give, revoke, or refrain from giving an advance directive is similarly liable in the amount of \$10,000. The statutory penalties are in addition to any other remedies that may exist in tort or contract, and to criminal penalties and professional discipline.

JUDICIAL REVIEW

California law does not favor judicial involvement in health care decisionmaking. The Power of Attorney Law provides as a general rule that a power of attorney is exercisable free of judicial intervention.⁷³ The Natural Death Act declares that “in the absence of a controversy, a court normally is not the proper forum in which to make decisions regarding life-sustaining treatment.”⁷⁴ In connection with incapacitated patients in nursing homes, the Legislature has found:⁷⁵

The current system is not adequate to deal with the legal, ethical, and practical issues that are involved in making health care decisions for incapacitated skilled nursing facility or intermediate care facility residents who lack surrogate decisionmakers. Existing Probate Code procedures, including public conservatorship, are inconsistently interpreted and applied, cumbersome, and sometimes unavailable for use in situations in which day-to-day medical treatment decisions must be made on an on-going basis.

Appellate decisions also caution against overinvolvement of courts in the intensely personal realm of health care decisionmaking. However, there may be occasions where a dispute must be resolved and an appropriately tailored procedure is needed.

73. Prob. Code § 4900.

74. Health & Safety Code § 7185.5(e).

75. 1992 Cal. Stat. ch. 1303, § 1(b).

The UHCDA takes a similar hands-off approach:⁷⁶

[T]he Act provides a procedure for the resolution of disputes. While the Act is in general to be effectuated without litigation, situations will arise where resort to the courts may be necessary. For that reason, the Act authorizes the court to enjoin or direct a health-care decision or order other equitable relief and specifies who is entitled to bring a petition.

The proposed law contains a procedure drawn largely from the Power of Attorney Law.⁷⁷ Under this procedure, any of the following persons may file a petition in the superior court: the patient, the patient's spouse (unless legally separated), a relative of the patient, the patient's agent or surrogate (including a member of a surrogate committee), the conservator of the person of the patient, a court investigator, the public guardian of the county where the patient resides, the supervising health care provider or health care institution, and any other interested person or friend of the patient. As under existing law, there is no right to a jury trial.⁷⁸

The grounds for a petition are broad, but not unlimited, and include determining (1) whether the patient has capacity to make health care decisions, (2) whether an advance health care directive is in effect, and (3) whether the acts or proposed acts of an agent or surrogate (including a surrogate committee) are consistent with the patient's desires as expressed in an advance health care directive or otherwise made known to the court or, where the patient's desires are

76. UHCDA Prefatory Note.

77. See Prob. Code §§ 4900-4947. Because of the placement of the Health Care Decisions Law beginning at Section 4600, the judicial proceedings provisions (Part 5) applicable to non-health care powers of attorney are moved to form a new Part 4 (commencing with Section 4500). The law applicable to non-health care powers remains the same; only the special provisions concerning health care powers of attorney would be removed.

78. Prob. Code § 4904.

unknown or unclear, whether the acts or proposed acts of the agent or surrogate are in the patient's best interest.

When capacity is to be determined in judicial proceedings, the provisions of the Due Process in Capacity Determinations Act⁷⁹ are applicable. The standard for reviewing the agent's or surrogate's actions is consistent with the general standard applicable under the proposed Health Care Decisions Law, as already discussed.⁸⁰

COURT-AUTHORIZED MEDICAL TREATMENT

The court-authorized medical treatment procedure was enacted on Commission recommendation in 1979.⁸¹ The original intent of this procedure, as described in the Commission's Comment preceding Probate Code Section 3200, was as follows:

The provisions of this part afford an alternative to establishing a conservatorship of the person where there is no ongoing need for a conservatorship. The procedural rules of this part provide an expeditious means of obtaining authorization for medical treatment while safeguarding basic rights of the patient: The patient has a right to counsel....

79. Prob. Code §§ 810-813.

80. See *supra* text accompanying note 61.

81. Prob. Code §§ 3200-3211, enacted by 1979 Cal. Stat. ch. 726, § 3; *Recommendation Relating to Guardianship-Conservatorship Law*, 14 Cal. L. Revision Comm'n Reports 501, 577-78 (1978); *Guardianship-Conservatorship Law with Official Comments*, 15 Cal. L. Revision Comm'n Reports 451, 540-41, 870-76 (1980). The procedure was repealed and reenacted in 1990 when the new Probate Code replaced the former Probate Code. See 1990 Cal. Stat. ch. 79, § 14. Coverage was extended to mental health, operative in 1991. See 1990 Cal. Stat. ch. 710, § 12; *Recommendation Relating to Court-Authorized Medical Treatment*, 20 Cal. L. Revision Comm'n Reports 537 (1990).

Some additional amendments have been made to the original procedure, mainly as a result of the Due Process in Competency Determinations Act (DPCDA) (1995 Cal. Stat. ch. 842, §§ 9-11), which revised the procedural rules in Sections 3201, 3204, and 3208 related to determinations of capacity to make health care decisions ("give informed consent").

The hearing is held after notice to the patient, the patient's attorney, and such other persons as the court orders.... The court may determine the issue on medical affidavits alone if the attorney for the petitioner and the attorney for the patient so stipulate.... The court may not order medical treatment under this part if the patient has capacity to give informed consent to the treatment but refuses to do so....

The authority of the court, or a surrogate appointed by the court, to authorize medical treatment under the Section 3200 procedure is not as broad as a conservator with full powers, an agent under a power of attorney for health care, or a statutory surrogate under the proposed Health Care Decisions Law. Where the conservatee has been adjudicated to lack the capacity to give informed consent to medical treatment, a conservator under Section 2355 can authorize removal of life-sustaining treatment (i.e., refuse consent to further treatment), if the decision is made in good faith and is based on appropriate medical advice.⁸²

The Section 3200 procedure has not been interpreted by the appellate courts to permit withholding or withdrawing life support. The statutory language is clearly directed toward care needed to maintain health. It permits an order authorizing the "recommended course of medical treatment" and "designating a person to give consent to the recommended course of medical treatment" if all of the following are determined from the evidence:⁸³

- (1) The existing or continuing medical condition of the patient requires the recommended course of medical treatment.

- (2) If untreated, there is a probability that the condition will become life-endangering or result in a serious threat to the physical or mental health of the patient.

82. Conservatorship of Drabick, 200 Cal. App. 3d 185, 216-17, 245 Cal. Rptr. 840 (1988); see also Conservatorship of Morrison, 206 Cal. App. 3d 304, 309-10, 253 Cal. Rptr. 530 (1988).

83. Prob. Code § 3208.

(3) The patient is unable to give an informed consent to the recommended course of treatment.

The reference to the probability that the condition will become life-endangering is not designed to address the situation of the patient in a persistent vegetative state whose continued existence is not seriously threatened. Since the Section 3200 procedure was not designed to deal with end-of-life decisionmaking, there is no statutory procedure available for making decisions in the best interest of a patient in a persistent vegetative state, short of appointment of a conservator with full powers under Section 2355. Appointment of a conservator is usually not a feasible alternative because of the expense and the lack of a person willing to serve as the conservator of the person.

The proposed law would remedy this problem by amending the court-authorized medical treatment procedure to cover withholding or withdrawing life-sustaining treatment. These revisions would make the court's authority to order treatment (or appoint a person to make health care decisions) consistent with the scope of other surrogates' authority under the proposed Health Care Decisions Law. While the proposed law makes clear, consistent with case law, that resort to the courts is disfavored, and should only be a last resort when all other means of resolving the issue have failed, the law still needs to provide an effective and consistent remedy for the difficult cases that cannot be resolved short of judicial proceedings.

CONSERVATOR'S RESPONSIBILITY TO MAKE HEALTH CARE DECISIONS

As discussed above, the proposed law adopts a general standard for making health care decisions by surrogates, including conservators, both private and public. The Commission is not proposing in this recommendation to overhaul the health care provisions in the Guardianship-Conservator-

ship Law.⁸⁴ However, it is important to conform Probate Code Section 2355 governing health care decisions for conservatees who have been adjudged to lack capacity to make health care decisions. The amendments adopt some terminology of the proposed law, so that it is clear that all health care decisions are covered, including withholding and withdrawing life-sustaining treatment, and adds the requirement that the conservator is to make decisions based on the conservatee's desires, if known, or based on a determination of the conservatee's best interest, taking into account the conservatee's personal values known to the conservator.

The proposed revision is consistent with *Conservatorship of Drabick*.⁸⁵ Incapacitated patients

retain the right to have appropriate medical decisions made on their behalf. An appropriate medical decision is one that is made in the patient's best interests, as opposed to the interests of the hospital, the physicians, the legal system, or someone else.... To summarize, California law gives persons a right to determine the scope of their own medical treatment, this right survives incompetence in the sense that incompetent patients retain the right to have appropriate decisions made on their behalf, and Probate Code section 2355 delegates to conservators the right and duty to make such decisions.

Use of the terms "health care" and "health care decision" from the proposed Health Care Decisions Law would make clear that the scope of health care decisions that can be made by a conservator under this procedure is the same as provided generally in the Health Care Decisions Law.

The importance of the existing statutory language concerning the exclusive authority of the conservator and the duty

84. See *supra* notes 11-13.

85. 220 Cal. App. 3d 185, 205, 245 Cal. Rptr. 840 (1988) (footnotes omitted).

this places on the conservator was also emphasized in *Drabick*:⁸⁶

The statute gives the conservator the exclusive authority to exercise the conservatee's rights, and it is the conservator who must make the final treatment decision regardless of how much or how little information about the conservatee's preferences is available. There is no necessity or authority for adopting a rule to the effect that the conservatee's desire to have medical treatment withdrawn must be proved by clear and convincing evidence or another standard. Acknowledging that the patient's expressed preferences are relevant, it is enough for the conservator, who must act in the conservatee's best interests, to consider them in good faith.

The intent of the rule in the proposed law is to protect and further the patient's interest in making a health care decision in accordance with the patient's expressed desires, where known, and if not, to make a decision in the patient's best interest, taking personal values into account. The necessary determinations are to be made by the conservator, whether private or public, in accordance with the statutory standard. Court control or intervention in this process is neither required by statute, nor desired by the courts.⁸⁷

TECHNICAL MATTERS

Location of Proposed Law

The proposed Health Care Decisions Law would be located in the Probate Code following the Power of Attorney Law. There is no ideal location for a statute that applies both to incapacity planning options (e.g., the power of attorney for health care) and to standards governing health care decision-

86. *Id.* at 211-12.

87. See, e.g., *Conservatorship of Morrison*, 206 Cal. App. 3d 304, 312, 253 Cal. Rptr. 530 (1988); *Drabick*, 200 Cal. App. 3d at 198-200.

making for incapacitated adults. But considering the alternatives, the Probate Code appears to be the best location because of associated statutes governing conservatorship of the person, court-authorized medical treatment, and powers of attorney. In addition, estate planning and elder law practitioners are familiar with the Probate Code.

Severance from Power of Attorney Law

Drafting health care decisionmaking rules as a separate statute should eliminate or minimize the numerous exceptions and overlays in the Power of Attorney Law, thereby improving the organization and usability of both the Power of Attorney Law as it relates to property and financial matters and the law relating to health care powers.⁸⁸

Application to Out-of-State Advance Directives

Existing law recognizes the validity of certain advance directives executed under the law of another state, or executed outside California in compliance with California law, both as

88. The general rule in Probate Code Section 4050 provides that the Power of Attorney Law (PAL, Division 4.5 of the Probate Code) “applies to” various types of powers of attorney, including DPAHCs under Part 4 (commencing with Section 4600). Section 4051 provides that the general agency rules in the Civil Code apply to “powers of attorney” unless the PAL provides a specific rule. Section 4100 provides that Part 2 governing “Powers of Attorney Generally” applies to all powers under the division, subject to special rules applicable to DPAHCs. The general rules on creation and effect of powers of attorney are set out in Sections 4120-4130, modification and revocation are governed by Sections 4150-4155, qualifications and duties of attorneys-in-fact are in Sections 4200 — these rules apply in general to all types of powers.

Several PAL sections have special additional health care rules or exceptions: §§ 4122(d) (witnesses), 4123(d) (permissible purposes), 4128(c)(2) (warning statement), 4152(a)(4) (exercise of authority after death of principal), 4203(b) (attorney-in-fact’s authority to appoint successor), 4206(c) (relation to court-appointed fiduciary)). As an exception to the general rule, Section 4260 provides that Article 3 (§§ 4260-4266) of Chapter 4 concerning authority of attorneys-in-fact does not apply to DPAHCs.

to powers of attorney for health care⁸⁹ and declarations of a type permitted by the Natural Death Act.⁹⁰ The proposed law consolidates these rules and applies them to all written advance directives, thus treating individual health care instructions the same as powers of attorney.

Application to Pre-existing Instruments

The proposed law would apply to all advance directives, as broadly defined in the new law, beginning on July 1, 2000. It is unlikely that circumstances could arise where the new law would invalidate older powers of attorney or declarations under the Natural Death Act, but the proposed law makes clear that it does not affect the validity of an older instrument that was valid under existing law. The proposed law would not revive instruments that are invalid under existing law.⁹¹ However, where a surrogate is required to take into account the wishes of a patient, it may be appropriate to consider and evaluate expressions of the patient's health care preferences stated in a now obsolete form.

OTHER PROCEDURES

DNR Orders

The proposed law continues the existing special procedures governing requests to forgo resuscitative measures (DNR orders)⁹² with a few technical revisions for consistency with

89. Prob. Code § 4653; see also Section 4752 (presumption of validity regardless of place of execution).

90. Health & Safety Code § 7192.5; see also Section 7192 (presumption of validity).

91. For example, some durable powers of attorney for health care executed between January 1, 1984, and December 31, 1991, were subject to a seven-year term (which could be extended if the term expired when the principal was incapacitated). See Prob. Code § 4654. Practically speaking, it is virtually certain that this class of powers will have expired by July 1, 2000.

92. See Prob. Code § 4753, enacted by 1994 Cal. Stat. ch. 966, § 3.

definitions under the Health Care Decisions Law. The Commission did not undertake a substantive review of the recently enacted DNR rules.

Secretary of State's Registry

Existing law requires the Secretary of State to establish a registry for durable powers of attorney.⁹³ The registry is intended to provide information concerning the existence and location of a person's durable power of attorney for health care. The registry is strictly voluntary. It has no effect on the validity of a power of attorney for health care,⁹⁴ nor is a health care provider required to apply to the registry for information.⁹⁵

The proposed law continues the registry provisions, but in the interest of treating all advance health care directives equally, provides for registration of individual health care instructions on the same basis as powers of attorney for health care. The Commission has not evaluated the registry system, although the Commission is informed that as of late-1998 there were fewer than 100 filings and no inquiries had been directed to the registry system.

93. Prob. Code §§ 4800-4806. The registry was established pursuant to 1994 Cal. Stat. ch. 1280.

94. Prob. Code §§ 4804-4805.

95. Prob. Code § 4806.

HEALTH CARE DECISIONS FOR ADULTS WITHOUT DECISIONMAKING CAPACITY

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HEALTH CARE DECISIONS FOR ADULTS WITHOUT DECISIONMAKING CAPACITY

Division 4.7 (added). Health care decisions

SEC. _____. Division 4.7 (commencing with Section 4600) is added to the Probate Code, to read:

DIVISION 4.7. HEALTH CARE DECISIONS

PART 1. DEFINITIONS AND GENERAL

CHAPTER 1. SHORT TITLE AND DEFINITIONS

§ 4600. Short title

4600. This division may be cited as the Health Care Decisions Law.

Comment. Section 4600 is new and provides a convenient means of referring to this division. The Health Care Decisions Law is essentially self-contained, but other agency statutes may be applied as provided in Section 4688. See also Sections 20 *et seq.* (general definitions applicable in Probate Code depending on context), 4755 (application of general procedural rules). For the scope of this division, see Section 4651.

Many provisions in Parts 1, 2, and 3 are the same as or drawn from the Uniform Health-Care Decisions Act (1993). Several general provisions included in the Uniform Health-Care Decisions Act (1993) are generalized elsewhere in this code. See Sections 2(b) (construction of provisions drawn from uniform acts) (*cf.* UHCDA § 15), 11 (severability) (*cf.* UHCDA § 17). In Comments to sections in this title, a reference to the “Uniform Health-Care Decisions Act (1993)” or the “uniform act” (in context) means the official text of the uniform act approved by the National Conference of Commissioners on Uniform State Laws.

§ 4603. Application of definitions

4603. Unless the provision or context otherwise requires, the definitions in this chapter govern the construction of this division.

Comment. Section 4603 serves the same purpose as former Section 4600 and is comparable to Section 4010 (Power of Attorney Law).

Some definitions included in the Uniform Health-Care Decisions Act (1993) are generalized elsewhere in this code. See Sections 56 (“person” defined) (*cf.* uniform act Section 1(10)), 74 (“state” defined) (*cf.* uniform act Section 1(15)).

§ 4605. Advance health care directive, advance directive

4605. “Advance health care directive” or “advance directive” means either an individual health care instruction or a power of attorney for health care.

Comment. Section 4605 is new. The first sentence is the same as Section 1(1) of the Uniform Health-Care Decisions Act (1993), except that the term “advance directive” is defined for convenience. “Advance directive” is commonly used in practice as a shorthand. Statutory language also may use the shorter term. See, e.g., Section 4698. A declaration or directive under the repealed Natural Death Act (former Health & Safety Code § 7185 *et seq.*) is a type of advance directive. See Section 4623 Comment.

See also Sections 4623 (“individual health care instruction” defined), 4629 (“power of attorney for health care” defined).

Background from Uniform Act. The term “advance health-care directive” appears in the federal Patient Self-Determination Act enacted as Sections 4206 and 4751 of the Omnibus Budget Reconciliation Act of 1990 and has gained widespread usage among health-care professionals. [Adapted from Unif. Health-Care Decisions Act § 1(1) comment (1993).]

§ 4607. Agent

4607. (a) “Agent” means an individual designated in a power of attorney for health care to make a health care decision for the principal, regardless of whether the person is known as an agent or attorney-in-fact, or by some other term.

(b) “Agent” includes a successor or alternate agent.

Comment. Section 4607 is consistent with the definition of attorney-in-fact in the Power of Attorney Law. See Section 4014. The first part of subdivision (a) is the same as Section 1(2) of the Uniform Health-Care Decisions Act (1993). For limitations on who may act as a health care agent, see Section 4659.

See also Sections 4629 (“power of attorney for health care” defined), 4633 (“principal” defined).

Background from Uniform Act. The definition of “agent” is not limited to a single individual. The Act permits the appointment of co-agents and alternate agents. [Adapted from Unif. Health-Care Decisions Act § 1(2) comment (1993).]

§ 4609. Capacity

4609. “Capacity” means a patient’s ability to understand the nature and consequences of proposed health care, including its significant benefits, risks, and alternatives, and to make and communicate a health care decision.

Comment. Section 4609 is a new provision drawn from former Health and Safety Code Section 1418.8(b) and Section 1(3) of the Uniform Health-Care Decisions Act (1993).

For provisions in this division relating to capacity, see Sections 4651 (authority of person having capacity not affected), 4657 (presumption of capacity), 4658 (determination of capacity and other medical conditions), 4682 (when agent’s authority effective), 4670 (authority to give individual health care instruction), 4671 (authority to execute power of attorney for health care), 4683 (scope of agent’s authority), 4695 (revocation of power of attorney for health care), 4710 (authority of surrogate to make health care decisions), 4720 (health care decisions for patient without surrogates), 4732 (duty of primary physician to record relevant information), 4733 (obligations of health care provider), 4766 (petition as to durable power of attorney for health care).

See also Sections 4615 (“health care” defined), 4617 (“health care decision” defined).

§ 4611. Community care facility

4611. “Community care facility” means a “community care facility” as defined in Section 1502 of the Health and Safety Code.

Comment. Section 4611 continues former Section 4603 without substantive change.

For provisions in this division using this term, see Sections 4659 (limitations on who may act as agent or surrogate), 4673 (witnessing requirements in skilled nursing facility).

§ 4613. Conservator

4613. “Conservator” means a court-appointed conservator having authority to make a health care decision for a patient.

Comment. Section 4613 is a new provision and serves the same purpose as Section 1(4) of the Uniform Health-Care Decisions Act (1993) (definition of “guardian”). Terminology in other states may vary, but the law applies the same rules regardless of terminology.

For provisions in this division concerning conservators, see Sections 4617 (“health care decision” defined), 4631 (“primary physician” defined), 4643 (“surrogate” defined), 4659 (limitations on who may act as agent or surrogate), 4672 (nomination of conservator in written advance health care directive), 4696 (duty to communicate revocation), 4710 (authority of surrogate to make health care decisions), 4732 (duty of primary physician to record relevant information), 4753 (limitations on right to petition), 4765 (petitioners), 4770 (temporary health care order).

See also Section 4617 (“health care decision” defined), 4625 (“patient” defined).

§ 4615. Health care

4615. “Health care” means any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a patient’s physical or mental condition.

Comment. Section 4615 continues the first part of former Section 4609 without substantive change and is the same in substance as Section 1(5) of the Uniform Health-Care Decisions Act (1993).

See also Section 4625 (“patient” defined).

Background from Uniform Act. The definition of “health care” is to be given the broadest possible construction. It includes the types of care referred to in the definition of “health-care decision” [Prob. Code § 4617], and to care, including custodial care, provided at a “health-care institution” [Prob. Code § 4619]. It also includes non-medical remedial treatment. [Adapted from Unif. Health-Care Decisions Act § 1(5) comment (1993).]

§ 4617. Health care decision

4617. “Health care decision” means a decision made by a patient or the patient’s agent, conservator, or surrogate, regarding the patient’s health care, including the following:

(a) Selection and discharge of health care providers and institutions.

(b) Approval or disapproval of diagnostic tests, surgical procedures, and programs of medication.

(c) Directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation.

Comment. Section 4617 supersedes former Section 4612 and is the same in substance as Section 1(6) of the Uniform Health-Care Decisions Act (1993), with the substitution of the reference to cardiopulmonary resuscitation in subdivision (c) for the uniform act reference to orders not to resuscitate. Adoption of the uniform act formulation is not intended to limit the scope of health care decisions applicable under former law. Thus, like former law, this section encompasses consent, refusal of consent, or withdrawal of consent to health care, or a decision to begin, continue, increase, limit, discontinue, or not to begin any health care. Depending on the circumstances, a health care decision may range from a decision concerning one specific treatment through an extended course of treatment, as determined by applicable standards of medical practice.

An effective health care decision must be made with informed consent. See, e.g., *Cobbs v. Grant*, 8 Cal. 3d 229, 242, 502 P.2d 1, 104 Cal. Rptr. 505 (1972); *Barber v. Superior Court*, 147 Cal. App. 3d 1006, 1015, 195 Cal. Rptr. 484 (1983). While this division does not use the phrase “informed consent,” it is assumed that the statute will be read in light of this well-established doctrine.

See also Sections 4607 (“agent” defined), 4613 (“conservator” defined), 4615 (“health care” defined), 4625 (“patient” defined), 4643 (“surrogate” defined).

§ 4619. Health care institution

4619. “Health care institution” means an institution, facility, or agency licensed, certified, or otherwise authorized or permitted by law to provide health care in the ordinary course of business.

Comment. Section 4619 is a new provision and is the same as Section 1(7) of the Uniform Health-Care Decisions Act (1993).

For provisions in this division using this term, see Sections 4654 (compliance with generally accepted health care standards), 4659 (limitations on who may act as agent or surrogate), 4675 (restriction on requiring or prohibiting advance directive), 4696 (duty to communicate

revocation), 4701 (optional form of advance health care directive), 4711 (patient's designation of surrogate), 4722 (composition of surrogate committee), 4733 (obligations of health care institution), 4734 (right to decline for reasons of conscience or institutional policy), 4735 (health care institution's right to decline ineffective care), 4736 (obligations of declining health care institution), 4740 (immunities of health care provider or institution), 4742 (statutory damages), 4765 (petitioners), 4785 (application of request to forgo resuscitative measures).

See also Section 4615 ("health care" defined).

Background from Uniform Act. The term "health-care institution" includes a hospital, nursing home, residential-care facility, home health agency, or hospice. [Adapted from Unif. Health-Care Decisions Act § 1(7) comment (1993).]

§ 4621. Health care provider

4621. "Health care provider" means an individual licensed, certified, or otherwise authorized or permitted by the law of this state to provide health care in the ordinary course of business or practice of a profession.

Comment. Section 4621 continues former Section 4615 without substantive change and is the same as Section 1(8) of the Uniform Health-Care Decisions Act (1993). This section also continues former Health and Safety Code Section 7186(c) (Natural Death Act) without substantive change.

For provisions in this division using this term, see Sections 4617 ("health care decision" defined), 4641 ("supervising health care provider" defined), 4654 (compliance with generally accepted health care standards), 4659 (limitations on who may act as agent or surrogate), 4673 (witnessing requirements in skilled nursing facility), 4674 (validity of written advance directive executed in another jurisdiction), 4675 (restriction on requiring or prohibiting advance directive), 4685 (agent's priority), 4696 (duty to communicate revocation), 4701 (optional form of advance health care directive), 4712 (selection of statutory surrogate), 4733 (obligations of health care provider), 4734 (health care provider's right to decline for reasons of conscience), 4735 (health care provider's right to decline ineffective care), 4736 (obligations of declining health care provider), 4740 (immunities of health care provider), 4742 (statutory damages).

See also Section 4615 ("health care" defined).

§ 4623. Individual health care instruction, individual instruction

4623. “Individual health care instruction” or “individual instruction” means a patient’s written or oral direction concerning a health care decision for the patient.

Comment. Section 4623 is a new provision and is the same in substance as Section 1(9) of the Uniform Health-Care Decisions Act (1993). The term “individual health care instruction” is included to provide more clarity. A declaration or directive under the repealed Natural Death Act (former Health & Safety Code § 7185 *et seq.*) is an individual health care instruction.

For provisions in this division using this term, see Sections 4605 (“advance health care directive” defined), 4625 (“patient” defined), 4658 (determination of capacity and other medical conditions), 4670 (individual health care instruction recognized), 4671 (power of attorney for health care may include individual instruction), 4684 (standard governing agent’s health care decisions), 4714 (standard governing surrogate’s health care decisions), 4720 (application of chapter governing health care decisions for patients without surrogates), 4732 (duty of primary physician to record relevant information), 4733 (obligations of health care provider or institution), 4734 (health care provider’s or institution’s right to decline), 4735 (right to decline to provide ineffective care), 4736 (obligations of declining health care provider or institution).

See also Section 4617 (“health care decision” defined), 4625 (“patient” defined).

Background from Uniform Act. The term “individual instruction” includes any type of written or oral direction concerning health-care treatment. The direction may range from a written document which is intended to be effective at a future time if certain specified conditions arise and for which a form is provided in Section 4 [Prob. Code § 4701], to the written consent required before surgery is performed, to oral directions concerning care recorded in the health-care record. The instruction may relate to a particular health-care decision or to health care in general. [Adapted from Unif. Health-Care Decisions Act § 1(9) comment (1993).]

§ 4625. Patient

4625. “Patient” means an adult whose health care is under consideration, and includes a principal under a power of attorney for health care and an adult who has given an individual health care instruction or designated a surrogate.

Comment. Section 4625 is a new provision added for drafting convenience. “Adult” includes an emancipated minor. See Fam. Code §§ 7002 (emancipation), 7050 (emancipated minor considered as adult for consent to medical, dental, or psychiatric care). For provisions governing surrogates, see Section 4710 *et seq.*

See also Sections 4615 (“health care” defined), 4623 (“individual health care instruction” defined), 4629 (“power of attorney for health care” defined), 4633 (“principal” defined), 4643 (“surrogate” defined). Compare Section 3200 (“patient” defined for purposes of court-authorized medical treatment procedure).

§ 4627. Physician

4627. “Physician” means a physician and surgeon licensed by the Medical Board of California or the Osteopathic Medical Board of California.

Comment. Section 4627 continues and generalizes former Health and Safety Code Section 7186(g) (Natural Death Act) and is the same in substance as Section 1(11) of the Uniform Health-Care Decisions Act (1993).

§ 4629. Power of attorney for health care

4629. “Power of attorney for health care” means a written instrument designating an agent to make health care decisions for the principal.

Comment. Section 4629 supersedes former Section 4606 (defining “durable power of attorney for health care”) and is the same in substance as Section 1(12) of the Uniform Health-Care Decisions Act (1993). The writing requirement continues part of Section 4022 (defining “power of attorney” generally) as it applied to powers of attorney for health care under former law, and is consistent with part of the second sentence of Section 2(b) of the Uniform Health-Care Decisions Act (1993).

See also Sections 4607 (“agent” defined), 4617 (“health care decision” defined).

§ 4631. Primary physician

4631. “Primary physician” means a physician designated by a patient or the patient’s agent, conservator, or surrogate, to have primary responsibility for the patient’s health care or, in the absence of a designation or if the designated physician is

not reasonably available or declines to act as primary physician, a physician who undertakes the responsibility.

Comment. Section 4631 supersedes former Health and Safety Code Section 7186(a) (“attending physician” defined) and is the same in substance as Section 1(13) of the Uniform Health-Care Decisions Act (1993), with the addition of the reference to the ability to decline to act as primary physician. To be a “primary physician” under this division, the substantive rules in this section must be complied with. The institutional designation of a person is not relevant. Hence, a “primary care physician” or a “hospitalist” may or may not be a “primary physician,” depending on the circumstances.

For provisions in this division using this term, see Sections 4641 (“supervising health care provider” defined), 4658 (determination of capacity and other medical conditions), 4701 (optional form of advance health care directive), 4710 (authority of surrogate to make health care decisions), 4712 (selection of statutory surrogate), 4716 (reassessment of surrogate selection), 4720 (application of rules on patients without surrogates), 4721 (referral to interdisciplinary team), 4722 (composition of surrogate committee), 4723 (standards of review by surrogate committee), 4732 (duty of primary physician to record relevant information).

See also Sections 4607 (agent” defined), 4613 (“conservator” defined), 4615 (“health care” defined), 4627 (“physician” defined), 4635 (“reasonably available” defined), 4643 (“surrogate” defined).

Background from Uniform Act. The Act employs the term “primary physician” instead of “attending physician.” The term “attending physician” could be understood to refer to any physician providing treatment to the individual, and not to the physician whom the individual, or agent, guardian, or surrogate, has designated or, in the absence of a designation, the physician who has undertaken primary responsibility for the individual’s health care. [Adapted from Unif. Health-Care Decisions Act § 1(13) comment (1993).]

§ 4633. Principal

4633. “Principal” means an adult who executes a power of attorney for health care.

Comment. Section 4633 is the same in substance as Section 4026 in the Power of Attorney Law. “Adult” includes an emancipated minor. See Fam. Code §§ 7002 (emancipation), 7050 (emancipated minor considered as adult for consent to medical, dental, or psychiatric care).

See also Section 4629 (“power of attorney for health care” defined).

§ 4635. Reasonably available

4635. “Reasonably available” means readily able to be contacted without undue effort and willing and able to act in a timely manner considering the urgency of the patient’s health care needs.

Comment. Section 4635 is the same as Section 1(14) of the Uniform Health-Care Decisions Act (1993).

For provisions in this division using this term, see Sections 4631 (“primary physician” defined), 4641 (“supervising health care provider” defined), 4685 (agent’s priority), 4701 (optional form of advance health care directive), 4710 (authority of surrogate to make health care decisions), 4712 (selection of statutory surrogate), 4716 (reassessment of surrogate selection), 4720 (application of rules on patients without surrogates).

See also Section 4615 (“health care” defined), 4625 (“patient” defined).

Background from Uniform Act. The term “reasonably available” is used in the Act to accommodate the reality that individuals will sometimes not be timely available. The term is incorporated into the definition of “supervising health-care provider” [Prob. Code § 4641]. It appears in the optional statutory form (Section 4) [Prob. Code § 4701] to indicate when an alternate agent may act. In Section 5 [Prob. Code § 4712] it is used to determine when a surrogate will be authorized to make health-care decisions for an individual, and if so, which class of individuals has authority to act. [Adapted from Unif. Health-Care Decisions Act § 1(14) comment (1993).]

§ 4637. Residential care facility for the elderly

4637. “Residential care facility for the elderly” means a “residential care facility for the elderly” as defined in Section 1569.2 of the Health and Safety Code.

Comment. Section 4637 continues former Section 4618 without substantive change.

For provisions in this division using this term, see Sections 4659 (limitations on who may act as agent or surrogate), 4673 (witnessing requirements in skilled nursing facility), 4701 (optional form of advance health care directive).

§ 4639. Skilled nursing facility

4639. “Skilled nursing facility” means a “skilled nursing facility” as defined in Section 1250 of the Health and Safety Code.

Comment. Section 4639 is a new provision that incorporates the relevant definition from the Health and Safety Code.

For provisions in this division using this term, see Sections 4673 (witnessing requirements in skilled nursing facility), 4701 (optional form of advance health care directive).

§ 4641. Supervising health care provider

4641. “Supervising health care provider” means the primary physician or, if there is no primary physician or the primary physician is not reasonably available, the health care provider who has undertaken primary responsibility for a patient’s health care.

Comment. Section 4641 is a new provision and is the same in substance as Section 1(16) of the Uniform Health-Care Decisions Act (1993).

For provisions in this division using this term, see Sections 4659 (limitations on who may act as agent or surrogate), 4695 (revocation of power of attorney for health care), 4696 (duty to communicate revocation), 4701 (optional form of advance health care directive), 4711 (patient’s designation of surrogate), 4715 (disqualification of surrogate), 4730 (duty of health care provider to communicate), 4731 (duty of supervising health care provider to record relevant information), 4765 (petitioners).

See also Sections 4607 (“agent” defined), 4615 (“health care” defined), 4621 (“health care provider” defined), 4625 (“patient” defined), 4631 (“primary physician” defined), 4635 (“reasonably available” defined).

Background from Uniform Act. The definition of “supervising health-care provider” accommodates the circumstance that frequently arises where care or supervision by a physician may not be readily available. The individual’s primary physician is to assume the role, however, if reasonably available. [Adapted from Unif. Health-Care Decisions Act § 1(16) comment (1993).]

§ 4643. Surrogate

4643. “Surrogate” means an adult, other than a patient’s agent or conservator, authorized under this division to make a health care decision for the patient.

Comment. Section 4643 is a new provision and is the same in substance as Section 1(17) of the Uniform Health-Care Decisions Act (1993), except that this section refers to “conservator” instead of “guardian” and to “adult” instead of “individual.” “Adult” includes an emancipated minor. See Fam. Code § 7002 (emancipation). For provisions governing surrogates, see Section 4710 *et seq.*

For provisions in this division using this term, see Sections 4617 (health care decision), 4625 (patient), 4631 (primary physician), 4653 (mercy killing, assisted suicide, euthanasia not approved), 4657 (presumption of capacity), 4658 (determination of capacity and other medical conditions), 4659 (limitations on who may act as agent or surrogate), 4660 (use of copies), 4696 (duty to communicate revocation), 4710-4716 (health care surrogates), 4720 (application of rules on patients without surrogates), 4725 (general surrogate rules applicable to surrogate committee), 4731 (duty of supervising health care provider to record relevant information), 4732 (duty of primary physician to record relevant information), 4741 (immunities of agent and surrogate), 4750 (judicial intervention disfavored), 4762 (jurisdiction over agent or surrogate), 4763 (venue), 4765 (petitioners), 4766 (purposes of petition), 4769 (notice of hearing), 4771 (award of attorney’s fees). See also 4780 (request to forgo resuscitative measures), 4783 (forms for requests to forgo resuscitative measures).

See also Sections 4607 (“agent” defined), 4617 (“health care decision” defined), 4625 (“patient” defined).

Background from Uniform Act. The definition of “surrogate” refers to the individual having present authority under Section 5 [Prob. Code § 4710 *et seq.*] to make a health-care decision for a patient. It does not include an individual who might have such authority under a given set of circumstances which have not occurred. [Adapted from Unif. Health-Care Decisions Act § 1(17) comment (1993).]

CHAPTER 2. GENERAL PROVISIONS

§ 4650. Legislative findings

4650. The Legislature finds the following:

(a) In recognition of the dignity and privacy a person has a right to expect, the law recognizes that an adult has the fundamental right to control the decisions relating to his or her own health care, including the decision to have life-sustaining treatment withheld or withdrawn.

(b) Modern medical technology has made possible the artificial prolongation of human life beyond natural limits. In the interest of protecting individual autonomy, this prolongation of the process of dying for a person for whom continued health care does not improve the prognosis for recovery may violate patient dignity and cause unnecessary pain and suffering, while providing nothing medically necessary or beneficial to the person.

(c) In the absence of controversy, a court is normally not the proper forum in which to make health care decisions, including decisions regarding life-sustaining treatment.

Comment. Section 4650 preserves and continues the substance of the legislative findings set out in former Health and Safety Code Section 7185.5 (Natural Death Act). These findings, in an earlier form, have been relied upon by the courts. *Conservatorship of Drabick*, 200 Cal. App. 3d 185, 206, 245 Cal. Rptr. 840, 853 (1988); *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 1137, 225 Cal. Rptr. 297, 302 (1986); *Bartling v. Superior Court*, 163 Cal. App. 3d 186, 194-95, 209 Cal. Rptr. 220, 224-25 (1984); *Barber v. Superior Court*, 147 Cal. App. 3d 1006, 1015-16, 195 Cal. Rptr. 484, 489-90 (1983). The earlier legislative findings were limited to persons with a terminal condition or permanent unconscious condition. This restriction is not continued here in recognition of the broader scope of this division and the development of case law since enactment of the original Natural Death Act in 1976. References to “medical care” in former law have been changed to “health care” for consistency with the language of this division. See Section 4615 (“health care” defined). This is not intended as a substantive change. “Adult” includes an emancipated minor. See Fam. Code §§ 7002 (emancipation),

7050 (emancipated minor considered as adult for consent to medical, dental, or psychiatric care).

Parts of former Health and Safety Code Section 7185.5 that are more appropriately stated as substantive provisions are not continued here. See also Section 4750 (judicial intervention disfavored).

§ 4651. Scope of division

4651. (a) Except as otherwise provided, this division applies to health care decisions for adults who lack capacity to make health care decisions for themselves.

(b) This division does not affect any of the following:

(1) The right of an individual to make health care decisions while having the capacity to do so.

(2) The law governing health care in an emergency.

(3) The law governing health care for unemancipated minors.

Comment. Subdivision (a) of Section 4651 is a new provision.

Subdivision (b)(1) is the same in substance as Section 11(a) of the Uniform Health-Care Decisions Act (1993) and replaces former Health and Safety Code Section 7189.5(a) (Natural Death Act).

Subdivision (b)(2) continues the substance of former Section 4652(b).

Subdivision (b)(3) is new. This division applies to emancipated minors to the same extent as adults. See Fam. Code §§ 7002 (emancipation), 7050 (emancipated minor considered as adult for consent to medical, dental, or psychiatric care).

See also Sections 4605 (“advance health care directive” defined), 4615 (“health care” defined), 4617 (“health care decision” defined), 4687 (other authority of person named as agent not affected).

§ 4652. Excluded acts

4652. This division does not authorize consent to any of the following on behalf of a patient:

(a) Commitment to or placement in a mental health treatment facility.

(b) Convulsive treatment (as defined in Section 5325 of the Welfare and Institutions Code).

(c) Psychosurgery (as defined in Section 5325 of the Welfare and Institutions Code).

(d) Sterilization.

(e) Abortion.

Comment. Section 4652 continues former Section 4722 without substantive change and revises language for consistency with the broader scope of this division. A power of attorney may not vary the limitations of this section. See also Section 4653 (mercy killing, assisted suicide, euthanasia not approved).

§ 4653. Mercy killing, assisted suicide, euthanasia not approved

4653. Nothing in this division shall be construed to condone, authorize, or approve mercy killing, assisted suicide, or euthanasia. This division is not intended to permit any affirmative or deliberate act or omission to end life other than withholding or withdrawing health care pursuant to an advance health care directive, by a surrogate, or as otherwise provided, so as to permit the natural process of dying.

Comment. Section 4653 continues the first sentence of former Section 4723 without substantive change, and is consistent with Section 13(c) of the Uniform Health-Care Decisions Act (1993). This section also continues the substance of former Health and Safety Code Section 7191.5(g) (Natural Death Act). Language has been revised to conform to the broader scope of this division. This section provides a rule governing the interpretation of this division. It is not intended as a general statement beyond the scope of this division nor is it intended to affect any other authority that may exist.

See Sections 4670 *et seq.* (advance health care directives), 4710 *et seq.* (health care surrogates), 4725 (surrogate rules applicable to surrogate committee). See also Sections 4605 (“advance health care directive” defined), 4615 (“health care” defined), 4643 (“surrogate” defined).

§ 4654. Compliance with generally accepted health care standards

4654. This division does not authorize or require a health care provider or health care institution to provide health care contrary to generally accepted health care standards applicable to the health care provider or health care institution.

Comment. Section 4654 is the same as Section 13(d) of the Uniform Health-Care Decisions Act (1993). For a special application of this

general rule, see Section 4735 (right to decline to provide ineffective care). This section continues the substance of former Health & Safety Code Section 7191.5(f) (Natural Death Act) and subsumes the specific duty under former Health and Safety Code Section 7189.5(b) concerning providing comfort care and alleviation of pain.

See also Sections 4615 (“health care” defined), 4619 (“health care institution” defined), 4621 (“health care provider” defined).

§ 4655. Impermissible constructions

4655. (a) This division does not create a presumption concerning the intention of a patient who has not made or who has revoked an advance health care directive.

(b) In making health care decisions under this division, a patient’s attempted suicide shall not be construed to indicate a desire of the patient that health care be restricted or inhibited.

Comment. Subdivision (a) of Section 4655 is the same in substance as Section 13(a) of the Uniform Health-Care Decisions Act (1993).

Subdivision (b) continues the second sentence of former Section 4723 without substantive change and with wording changes to reflect the broader scope of this division.

See also Sections 4605 (“advance health care directive” defined), 4615 (“health care” defined), 4617 (“health care decision” defined), 4625 (“patient” defined).

§ 4656. Effect on death benefits

4656. Death resulting from withholding or withdrawing health care in accordance with this division does not for any purpose constitute a suicide or homicide or legally impair or invalidate a policy of insurance or an annuity providing a death benefit, notwithstanding any term of the policy or annuity to the contrary.

Comment. Section 4656 continues and generalizes former Health and Safety Code Section 7191.5(a)-(b) (Natural Death Act), and is the same in substance as Section 13(b) of the Uniform Health-Care Decisions Act (1993).

See also Section 4615 (“health care” defined).

§ 4657. Presumption of capacity

4657. A patient is presumed to have the capacity to make a health care decision, to give or revoke an advance health care directive, and to designate or disqualify a surrogate. This presumption is a presumption affecting the burden of proof.

Comment. Section 4657 is the same in substance as Section 11(b) of the Uniform Health-Care Decisions Act (1993). The presumption of capacity with regard to revocation continues the substance of former Section 4727(c), and is consistent with former Health and Safety Code Section 7189.5(a) (Natural Death Act). See also Section 4766(a) (petition to review capacity determinations). The burden of proof is on the person who seeks to establish that the principal did not have capacity. This section is also consistent with the rule applicable under Section 810 (due process in capacity determinations).

See also Sections 4605 (“advance health care directive” defined), 4609 (“capacity” defined), 4617 (“health care decision” defined), 4625 (“patient” defined), 4643 (“surrogate” defined).

Background from Uniform Act. Section 11 reinforces the principle of patient autonomy by providing a rebuttable presumption that an individual has capacity for all decisions relating to health care referred to in the Act. [Adapted from Unif. Health-Care Decisions Act § 11 comment (1993).]

§ 4658. Determination of capacity and other medical conditions

4658. Unless otherwise specified in a written advance health care directive, for the purposes of this division, a determination that a patient lacks or has recovered capacity, or that another condition exists that affects an individual health care instruction or the authority of an agent or surrogate, shall be made by the primary physician.

Comment. Section 4658 is drawn from Section 2(d) (advance directives) and part of Section 5(a) (surrogates) of the Uniform Health-Care Decisions Act (1993). This section makes clear that capacity determinations need not be made by the courts. For provisions governing judicial determinations of capacity, see Sections 810-813 (Due Process in Capacity Determinations Act). See also Section 4766 (petitions concerning advance directives). For the primary physician’s duty to record capacity determinations, see Section 4732. See also Section 4766(a) (petition to review capacity determinations).

See also Sections 4605 (“advance health care directive” defined), 4607 (“agent” defined), 4609 (“capacity” defined), 4623 (“individual health care instruction” defined), 4625 (“patient” defined), 4631 (“primary physician” defined), 4643 (“surrogate” defined).

Background from Uniform Act. Section 2(d) provides that unless otherwise specified in a written advance health-care directive, a determination that a principal has lost or recovered capacity to make health-care decisions must be made by the primary physician. For example, a principal might specify that the determination of capacity is to be made by the agent in consultation with the primary physician. Or a principal, such as a member of the Christian Science faith who relies on a religious method of healing and who has no primary physician, might specify that capacity be determined by other means. In the event that multiple decision makers are specified and they cannot agree, it may be necessary to seek court instruction as authorized by Section 14 [see Prob. Code § 4766].

Section 2(d) also provides that unless otherwise specified in a written advance health-care directive, the existence of other conditions which affect an individual instruction or the authority of an agent must be determined by the primary physician. For example, an individual might specify that an agent may withdraw or withhold treatment that keeps the individual alive only if the individual has an incurable and irreversible condition that will result in the individual’s death within a relatively short time. In that event, unless otherwise specified in the advance health-care directive, the determination that the individual has that condition must be made by the primary physician.

[Adapted from Unif. Health-Care Decisions Act § 2(d) comment (1993).]

§ 4659. Limitations on who may act as agent or surrogate

4659. (a) Except as provided in subdivision (b), none of the following persons may make health care decisions as an agent under a power of attorney for health care or a surrogate under this division:

(1) The supervising health care provider or an employee of the health care institution where the patient is receiving care.

(2) An operator or employee of a community care facility or residential care facility where the patient is receiving care.

(b) The prohibition in subdivision (a) does not apply to the following persons:

(1) An employee who is related to the patient by blood, marriage, or adoption.

(2) An employee who is employed by the same health care institution, community care facility, or residential care facility for the elderly as the patient.

(c) A conservator under the Lanterman-Petris-Short Act (Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code) may not be designated as an agent or surrogate to make health care decisions by the conservatee, unless all of the following are satisfied:

(1) The advance health care directive is otherwise valid.

(2) The conservatee is represented by legal counsel.

(3) The lawyer representing the conservatee signs a certificate stating in substance:

“I am a lawyer authorized to practice law in the state where this advance health care directive was executed, and the principal or patient was my client at the time this advance directive was executed. I have advised my client concerning his or her rights in connection with this advance directive and the applicable law and the consequences of signing or not signing this advance directive, and my client, after being so advised, has executed this advance directive.”

(d) This section does not apply to participation in or decisionmaking by a surrogate committee pursuant to Chapter 4 (commencing with Section 4720) of Part 2.

Comment. Subdivisions (a)-(c) of Section 4659 restate former Section 4702 without substantive change, and extend its principles to cover surrogates. The terms “supervising health care provider” and “health care institution” have been substituted for “treating health care provider” as appropriate, for consistency with the terms used in this division. See Section 4641 (“supervising health care provider” defined).

Subdivisions (a) and (b) serve the same purpose as Section 2(b) (fourth sentence) and Section 5(i) of the Uniform Health-Care Decisions Act (1993). Subdivision (a) does not preclude a person from appointing, for example, a friend who is a physician as the agent under the person’s

power of attorney for health care, but if the physician becomes the person's "supervising health care provider," the physician is precluded from acting as the agent under the power of attorney. See also Section 4673 (witnessing requirements in skilled nursing facilities).

Subdivision (b) provides a special exception to subdivision (a). This will, for example, permit a nurse to serve as agent for the nurse's spouse when the spouse is being treated at the hospital where the nurse is employed.

Subdivision (c) prescribes conditions that must be satisfied if a conservator is to be designated as the agent or surrogate for a conservatee under the Lanterman-Petris-Short Act. This subdivision has no application where a person other than the conservator is so designated.

Subdivision (d) makes clear that the rules governing surrogate committees under Sections 4720-4725 prevail over this section.

See also Sections 4605 ("advance health care directive" defined), 4607 ("agent" defined), 4611 ("community care facility" defined), 4613 ("conservator" defined), 4617 ("health care decision" defined), 4619 ("health care institution" defined), 4625 ("patient" defined), 4629 ("power of attorney for health care" defined), 4637 ("residential care facility for the elderly" defined), 4641 ("supervising health care provider" defined), 4643 ("surrogate" defined).

§ 4660. Use of copies

4660. A copy of a written advance health care directive, revocation of an advance directive, or designation or disqualification of a surrogate has the same effect as the original.

Comment. Section 4660 provides a special rule permitting the use of copies under this division. It is the same as Section 12 of the Uniform Health-Care Decisions Act (1993). The rule under this section for powers of attorney for health care differs from the rule under the Power of Attorney Law. See Section 4307 (certified copy of power of attorney).

See also Sections 4605 ("advance health care directive" defined), 4643 ("surrogate" defined).

Background from Uniform Act. The need to rely on an advance health-care directive may arise at times when the original is inaccessible. For example, an individual may be receiving care from several health-care providers or may be receiving care at a location distant from that where the original is kept. To facilitate prompt and informed decision making, this section provides that a copy of a valid written advance health-care directive, revocation of an advance health-care directive, or

designation or disqualification of a surrogate has the same effect as the original. [Adapted from Unif. Health-Care Decisions Act § 12 comment (1993).]

CHAPTER 3. TRANSITIONAL PROVISIONS

§ 4665. Application to existing advance directives and pending proceedings

4665. Except as otherwise provided by statute:

(a) On and after July 1, 2000, this division applies to all advance health care directives, including, but not limited to, durable powers of attorney for health care and declarations under the Natural Death Act (former Chapter 3.9 (commencing with Section 7185) of Part 1 of Division 7 of the Health and Safety Code), regardless of whether they were given or executed before, on, or after July 1, 2000.

(b) This division applies to all proceedings concerning advance health care directives commenced on or after July 1, 2000.

(c) This division applies to all proceedings concerning written advance health care directives commenced before July 1, 2000, unless the court determines that application of a particular provision of this division would substantially interfere with the effective conduct of the proceedings or the rights of the parties and other interested persons, in which case the particular provision of this division does not apply and prior law applies.

(d) Nothing in this division affects the validity of an advance health care directive executed before July 1, 2000, that was valid under prior law.

(e) Nothing in this division affects the validity of a durable power of attorney for health care executed on a printed form that was valid under prior law, regardless of whether execution occurred before, on, or after July 1, 2000.

Comment. Section 4665 serves the same purpose as Section 4054 in the Power of Attorney Law, but covers all advance health care directives,

including powers of attorney, written or oral individual health care instructions, and surrogate designations.

Subdivision (a) provides the general rule that this division applies to all advance health care directives, regardless of when a written advance directive was executed or an oral individual instruction was made. As provided in subdivision (d), however, nothing in this division invalidates any advance directive that was validly executed under prior law, and subdivision (e) protects individuals who happen to use an outdated printed form.

Subdivision (b) is a specific application of the general rule in subdivision (a). See Section 4750 *et seq.* (judicial proceedings). Subdivision (c) provides discretion to the court to resolve problems arising in proceedings commenced before the operative date.

See also Sections 4605 (“advance health care directive” defined), 4629 (“power of attorney for health care” defined).

PART 2 . UNIFORM HEALTH CARE DECISIONS ACT

CHAPTER 1. ADVANCE HEALTH CARE DIRECTIVES

Article 1. General Provisions

§ 4670. Authority to give individual health care instruction

4670. An adult having capacity may give an individual health care instruction. The individual instruction may be oral or written. The individual instruction may be limited to take effect only if a specified condition arises.

Comment. Section 4670 is drawn from Section 2(a) of the Uniform Health-Care Decisions Act (1993). This section supersedes part of former Health and Safety Code Section 7186.5 (Natural Death Act). “Adult” includes an emancipated minor. See Fam. Code §§ 7002 (emancipation), 7050 (emancipated minor considered as adult for consent to medical, dental, or psychiatric care).

See also Sections 4615 (“health care” defined), 4623 (“individual health care instruction” defined).

Background from Uniform Act. The individual instruction authorized in Section 2(a) may but need not be limited to take effect in specified circumstances, such as if the individual is dying. An individual

instruction may be either written or oral. [Adapted from Unif. Health-Care Decisions Act § 2(a) comment (1993).]

§ 4671. Authority to execute power of attorney for health care

4671. (a) An adult having capacity may execute a power of attorney for health care, as provided in Article 2 (commencing with Section 4680). The power of attorney for health care may authorize the agent to make health care decisions and may also include individual health care instructions.

(b) The principal in a power of attorney for health care may grant authority to make decisions relating to the personal care of the principal, including, but not limited to, determining where the principal will live, providing meals, hiring household employees, providing transportation, handling mail, and arranging recreation and entertainment.

Comment. Subdivision (a) of Section 4671 is drawn from the first and third sentences of Section 2(b) of the Uniform Health-Care Decisions Act (1993). The first sentence supersedes Section 4120 (who may execute power of attorney) to the extent it applied to powers of attorney for health care. “Adult” includes an emancipated minor. See Fam. Code §§ 7002 (emancipation), 7050 (emancipated minor considered as adult for consent to medical, dental, or psychiatric care).

Subdivision (b), relating to personal care authority, is parallel to Section 4123(c) (personal care authority permissible in non-health care power of attorney). For powers of attorney generally, see the Power of Attorney Law, Section 4000 *et seq.* Personal care powers are not automatic. Under subdivision (b), the agent does not have personal care powers except to the extent that they are granted by the principal.

See also Sections 4607 (“agent” defined), 4617 (“health care decision” defined), 4623 (“individual health care instruction” defined), 4629 (“power of attorney for health care” defined).

Background from Uniform Act. Section 2(b) authorizes a power of attorney for health care to include instructions regarding the principal’s health care. This provision has been included in order to validate the practice of designating an agent and giving individual instructions in one document instead of two. The authority of an agent falls within the discretion of the principal as expressed in the instrument creating the

power and may extend to any health-care decision the principal could have made while having capacity.

Section 2(b) excludes the oral designation of an agent. Section 5(b) [Prob. Code § 4711] authorizes an individual to orally designate a surrogate by personally informing the supervising health-care provider. A power of attorney for health care, however, must be in writing and signed by the principal, although it need not be witnessed or acknowledged [except in certain circumstances].

[Adapted from Unif. Health-Care Decisions Act § 2(b) comment (1993).]

§ 4672. Nomination of conservator in written advance directive

4672. (a) A written advance health care directive may include the individual's nomination of a conservator of the person or estate or both, or a guardian of the person or estate or both, for consideration by the court if protective proceedings for the individual's person or estate are thereafter commenced.

(b) If the protective proceedings are conservatorship proceedings in this state, the nomination has the effect provided in Section 1810 and the court shall give effect to the most recent writing executed in accordance with Section 1810, whether or not the writing is a written advance health care directive.

Comment. Section 4672 continues Section 4126 without substantive change, insofar as that section applied to powers of attorney for health care, and expands the scope of the rule to apply to other written advance health care directives. Subdivision (a) is the same in substance as Section 2(g) of the Uniform Health-Care Decisions Act (1993).

See also Sections 4605 ("advance health care directive" defined), 4613 ("conservator" defined).

§ 4673. Witnessing required in skilled nursing facility

4673. (a) If an individual is a patient in a skilled nursing facility when the advance health care directive is executed, the advance directive shall be acknowledged before a notary public or signed by at least two witnesses as provided in this section.

(b) If the advance health care directive is signed by witnesses, the following requirements shall be satisfied:

(1) The witnesses shall be adults.

(2) Each witness shall witness either the signing of the advance health care directive by the patient or the patient's acknowledgment of the signature or the advance directive.

(3) None of the following persons may act as a witness:

(A) The agent, with regard to a power of attorney for health care.

(B) The patient's health care provider or an employee of the patient's health care provider.

(C) The operator or an employee of a community care facility.

(D) The operator or an employee of a residential care facility for the elderly.

(4) Each witness shall make the following declaration in substance:

"I declare under penalty of perjury under the laws of California that the individual who signed or acknowledged this document is personally known to me, or that the identity of the individual was proven to me by convincing evidence, that the individual signed or acknowledged this advance health care directive in my presence, that the individual appears to be of sound mind and under no duress, fraud, or undue influence, that I am not the person appointed as agent by this document, and that I am not the individual's health care provider, an employee of the individual's health care provider, the operator of a community care facility, an employee of an operator of a community care facility, the operator of a residential care facility for the elderly, nor an employee of an operator of a residential care facility for the elderly."

(c) An advance health care directive governed by this section is not effective unless a patient advocate or ombudsman, as may be designated by the Department of Aging for this purpose pursuant to any other applicable provision of law, signs the advance directive as a witness, either as one of two witnesses or in addition to notarization. The patient advocate or ombudsman shall declare that he or she is serving as a witness as required by this subdivision. It is the intent of this subdivision to recognize that some patients in skilled nursing facilities are insulated from a voluntary decisionmaking role, by virtue of the custodial nature of their care, so as to require special assurance that they are capable of willfully and voluntarily executing an advance directive.

(d) For the purposes of the declaration of witnesses, “convincing evidence” means the absence of any information, evidence, or other circumstances that would lead a reasonable person to believe the individual executing the advance health care directive, whether by signing or acknowledging his or her signature, is not the individual he or she claims to be, and any one of the following:

(1) Reasonable reliance on the presentation of any one of the following, if the document is current or has been issued within five years:

(A) An identification card or driver’s license issued by the California Department of Motor Vehicles.

(B) A passport issued by the Department of State of the United States.

(2) Reasonable reliance on the presentation of any one of the following, if the document is current or has been issued within five years and contains a photograph and description of the person named on it, is signed by the person, bears a serial or other identifying number, and, in the event that the document is a passport, has been stamped by the United States Immigration and Naturalization Service:

(A) A passport issued by a foreign government.

(B) A driver's license issued by a state other than California or by a Canadian or Mexican public agency authorized to issue drivers' licenses.

(C) An identification card issued by a state other than California.

(D) An identification card issued by any branch of the armed forces of the United States.

(e) A witness who is a patient advocate or ombudsman may rely on the representations of the administrators or staff of the skilled nursing facility, or of family members, as convincing evidence of the identity of the patient if the patient advocate or ombudsman believes that the representations provide a reasonable basis for determining the identity of the patient.

(f) The provisions of this section applicable to witnesses do not apply to a notary who acknowledges an advance health care directive.

Comment. Subdivisions (a)-(c) of Section 4673 continue Sections 4121 and 4122 without substantive change, to the extent they applied to powers of attorney for health care, and continues former Section 4701 without substantive change, to the extent it applied to powers of attorney governed by this section. This section expands the witnessing and notarization rules under former law to cover all written advance directives executed in nursing homes, not just powers of attorney.

Subdivisions (d) and (e) continue the substance of relevant parts of former Section 4751 (convincing evidence of identity of principal) and apply to all written advance directives covered by this section, not just powers of attorney for health care as under former law.

Subdivision (f) is a new provision that makes clear that the special rules and restrictions applicable to witnesses are not applicable to notaries. Notaries are subject to obligations under other law by virtue of office. See Gov't Code § 8200 *et seq.*

See also Sections 4605 ("advance health care directive" defined), 4611 ("community care facility" defined), 4621 ("health care provider" defined), 4625 ("patient" defined), 4637 ("residential care facility for the elderly" defined), 4639 ("skilled nursing facility" defined).

§ 4674. Validity of written advance directive executed in another jurisdiction

4674. (a) A written advance health care directive or similar instrument executed in another state or jurisdiction in compliance with the laws of that state or jurisdiction or of this state, is valid and enforceable in this state to the same extent as a written advance directive validly executed in this state.

(b) In the absence of knowledge to the contrary, a physician or other health care provider may presume that a written advance health care directive or similar instrument, whether executed in another state or jurisdiction or in this state, is valid.

Comment. Subdivision (a) of Section 4674 continues former Section 4653 without substantive change, and extends its principles to apply to all written advance health care directives, which include both powers of attorney for health care and written individual instructions. This subdivision also continues and generalizes former Health and Safety Code Section 7192.5 (Natural Death Act). This subdivision is consistent with Section 2(h) of the Uniform Health-Care Decisions Act (1993), as applied to instruments.

Subdivision (b) continues former Section 4752 without substantive change, and broadens the former rule for consistency with the scope of this division. This subdivision also continues and generalizes former Health and Safety Code Section 7192 (Natural Death Act).

See also Section 4605 (“advance health care directive” defined), 4621 (“health care provider” defined), 4627 (“physician” defined). For the rule applicable under the Power of Attorney Law, see Section 4053.

Background from Uniform Act. Section 2(h) validates advance health-care directives which conform to the Act, regardless of when or where executed or communicated. This includes an advance health-care directive which would be valid under the Act but which was made prior to the date of its enactment and failed to comply with the execution requirements then in effect. It also includes an advance health-care directive which was made in another jurisdiction but which does not comply with that jurisdiction’s execution or other requirements. [Adapted from Unif. Health-Care Decisions Act § 2(h) comment (1993).]

§ 4675. Restriction on requiring or prohibiting advance directive

4675. A health care provider, health care service plan, health care institution, disability insurer, self-insured employee welfare plan, or nonprofit hospital plan or a similar insurance plan may not require or prohibit the execution or revocation of an advance health care directive as a condition for providing health care, admission to a facility, or furnishing insurance.

Comment. Section 4675 continues and generalizes former Section 4725, and contains the substance of Section 7(h) of the Uniform Health-Care Decisions Act (1993). The former provision applied only to powers of attorney for health care. This section supersedes former Health and Safety Code Sections 7191(e)-(f) and 7191.5(c) (Natural Death Act). This section is intended to eliminate the possibility that duress might be used by a health care provider, insurer, plan, or other entity to cause the patient to execute or revoke an advance directive. The reference to a “health care service plan” is drawn from Health and Safety Code Section 1345(f) in the Knox-Keene Health Care Service Plan Act of 1975.

See also Sections 4605 (“advance health care directive” defined), 4615 (“health care” defined), 4619 (“health care institution” defined), 4621 (“health care provider” defined).

Background from Uniform Act. Section 7(h), forbidding a health-care provider or institution to condition provision of health care on execution, non-execution, or revocation of an advance health-care directive, tracks the provisions of the federal Patient Self-Determination Act. 42 U.S.C. §§ 1395cc(f)(1)(C) (Medicare), 1396a(w)(1)(C) (Medicaid). [Adapted from Unif. Health-Care Decisions Act § 7(h) comment (1993).]

§ 4676. Right to health care information

4676. Unless otherwise specified in an advance health care directive, a person then authorized to make health care decisions for a patient has the same rights as the patient to request, receive, examine, copy, and consent to the disclosure of medical or any other health care information.

Comment. Section 4676 is drawn from Section 8 of the Uniform Health-Care Decisions Act (1993). This section continues former Section 4721 without substantive change, but is broader in scope since it covers all persons authorized to make health care decisions for a patient, not just

agents. A power of attorney may limit the right of the agent, for example, by precluding examination of specified medical records or by providing that the examination of medical records is authorized only if the principal lacks the capacity to give informed consent. The right of the agent is subject to any limitations on the right of the patient to reach medical records. See Health & Safety Code §§ 1795.14 (denial of right to inspect mental health records), 1795.20 (providing summary of record rather than allowing access to entire record).

See also Sections 4605 (“advance health care directive” defined), 4617 (“health care decision” defined), 4625 (“patient” defined).

Background from Uniform Act. An agent, conservator, [guardian,] or surrogate stands in the shoes of the patient when making health-care decisions. To assure fully informed decisionmaking, this section provides that a person who is then authorized to make health-care decisions for a patient has the same right of access to health-care information as does the patient unless otherwise specified in the patient’s advance health-care directive. [Adapted from Unif. Health-Care Decisions Act § 8 comment (1993).]

Article 2. Powers of Attorney for Health Care

§ 4680. Formalities for executing a power of attorney for health care

4680. A power of attorney for health care is legally sufficient if all of the following requirements are satisfied:

(a) The power of attorney is signed either (1) by the principal or (2) in the principal’s name by another adult in the principal’s presence and at the principal’s direction.

(b) The power of attorney satisfies applicable witnessing requirements of Section 4673.

Comment. Section 4680 continues Section 4121, insofar as it applied to powers of attorney for health care, without substantive change, except that (1) the power of attorney for health care is not required to be dated, (2) “adult” has been substituted for “person” in subdivision (a), and (3) the witnessing requirements in subdivision (b) are restricted to the special circumstances provided in Section 4673. “Adult” includes an emancipated minor. See Fam. Code §§ 7002 (emancipation), 7050 (emancipated minor considered as adult for consent to medical, dental, or psychiatric care).

Although the statute does not invalidate a power of attorney for health care that is not dated, providing the date of execution is strongly

recommended and a place for entering the date is included in the optional statutory form of the advance health care directive. See Section 4701. Omission of the dating requirement is consistent with Section 2(b) of the Uniform Health-Care Decisions Act.

A power of attorney must be in writing. See Section 4629 (“power of attorney for health care” defined). This section provides the general execution formalities for a power of attorney under this division. A power of attorney that complies with this section is legally sufficient as a grant of authority to an agent.

See also Section 4633 (“principal” defined).

§ 4681. Limitations expressed in power of attorney for health care

4681. (a) Except as provided in subdivision (b), the principal may limit the application of any provision of this division by an express statement in the power of attorney for health care or by providing an inconsistent rule in the power of attorney.

(b) A power of attorney for health care may not limit either the application of a statute specifically providing that it is not subject to limitation in the power of attorney or a statute concerning any of the following:

(1) Statements required to be included in a power of attorney.

(2) Operative dates of statutory enactments or amendments.

(3) Formalities for execution of a power of attorney for health care.

(4) Qualifications of witnesses.

(5) Qualifications of agents.

(6) Protection of third persons from liability.

Comment. Section 4681 continues Section 4101, insofar as it applied to powers of attorney for health care, without substantive change. This section makes clear that many of the statutory rules provided in this division are subject to express or implicit limitations in the power of attorney. If a statutory rule is not subject to control by the power of attorney, this is stated explicitly, either in a particular section or as to a group of sections.

See also Sections 4607 (“agent” defined), 4629 (“power of attorney for health care” defined), 4633 (“principal” defined).

§ 4682. When agent's authority effective

4682. Unless otherwise provided in a power of attorney for health care, the authority of an agent becomes effective only on a determination that the principal lacks capacity, and ceases to be effective on a determination that the principal has recovered capacity.

Comment. Section 4682 is drawn from Section 2(c) of the Uniform Health-Care Decisions Act (1993) and continues the substance of the last part of former Section 4720(a). See Sections 4657 (presumption of capacity), 4658 (determination of capacity and other medical conditions) & Comment. As under former law, the default rule is that the agent is not authorized to make health care decisions if the principal has the capacity to make health care decisions. The power of attorney may, however, give the agent authority to make health care decisions for the principal even though the principal does have capacity, but the power of attorney is always subject to Section 4695 (revocation of advance directive).

See also Sections 4607 (“agent” defined), 4609 (“capacity” defined), 4629 (“power of attorney for health care” defined), 4633 (“principal” defined).

Background from Uniform Act. Section 2(c) provides that the authority of the agent to make health-care decisions ordinarily does not become effective until the principal is determined to lack capacity and ceases to be effective should the principal recover capacity. A principal may provide, however, that the authority of the agent becomes effective immediately or upon the happening of some event other than the loss of capacity but may do so only by an express provision in the power of attorney. For example, a mother who does not want to make her own health-care decisions but prefers that her daughter make them for her may specify that the daughter as agent is to have authority to make health-care decisions immediately. The mother in that circumstance retains the right to later revoke the power of attorney as provided in Section 3 [Prob. Code § 4696]. [Adapted from Unif. Health-Care Decisions Act § 2(c) comment (1993).]

§ 4683. Scope of agent's authority

4683. Subject to any limitations in the power of attorney for health care:

(a) An agent designated in the power of attorney may make health care decisions for the principal to the same extent the

principal could make health care decisions if the principal had the capacity to do so.

(b) The agent may also make decisions that may be effective after the principal's death, including the following:

(1) Making a disposition under the Uniform Anatomical Gift Act (Chapter 3.5 (commencing with Section 7150) of Part 1 of Division 7 of the Health and Safety Code).

(2) Authorizing an autopsy under Section 7113 of the Health and Safety Code.

(3) Directing the disposition of remains under Section 7100 of the Health and Safety Code.

Comment. Section 4683 continues former Section 4720(b) without substantive change. Subdivision (a) is consistent with the last part of the first sentence of Section 2(b) of the Uniform Health-Care Decisions Act (1993). Technical revisions have made to conform to the language of this division. See Section 4658 (determination of capacity and other medical conditions). The agent's authority is subject to Section 4652 which precludes consent to certain specified types of treatment. See also Section 4653 (impermissible acts and constructions). The principal is free to provide any limitations on types of treatment in the durable power of attorney that are desired. See also Section 4750 *et seq.* (judicial proceedings).

The description of certain post-death decisions in subdivision (b) is not intended to limit the authority to make such decisions under the governing statutes in the Health and Safety Code.

See also Sections 4607 ("agent" defined), 4609 ("capacity" defined), 4615 ("health care" defined), 4617 ("health care decision" defined), 4629 ("power of attorney for health care" defined), 4635 ("reasonably available" defined).

§ 4684. Standard governing agent's health care decisions

4684. An agent shall make a health care decision in accordance with the principal's individual health care instructions, if any, and other wishes to the extent known to the agent. Otherwise, the agent shall make the decision in accordance with the agent's determination of the principal's best interest. In determining the principal's best interest, the

agent shall consider the principal's personal values to the extent known to the agent.

Comment. Section 4684 continues the substance of former Section 4720(c) and is the same as Section 2(e) of the Uniform Health-Care Decisions Act (1993). Although the new wording of this fundamental rule is different, Section 4684 continues the principle of former law that, in exercising authority, the agent has the duty to act consistent with the principal's desires if known or, if the principal's desires are unknown, to act in the best interest of the principal. The agent's authority is subject to Section 4652, which precludes consent to certain specified types of treatment. See also Section 4653 (mercy killing, assisted suicide, euthanasia not approved). The principal is free to provide any limitations on types of treatment in the power of attorney that are desired. See also Section 4750 *et seq.* (judicial proceedings). This fundamental standard is also applicable to decisions made by surrogate committees. See Section 4714.

See also Sections 4607 ("agent" defined), 4623 ("individual health care instruction" defined), 4633 ("principal" defined).

Background from Uniform Act. Section 2(e) requires the agent to follow the principal's individual instructions and other expressed wishes to the extent known to the agent. To the extent such instructions or other wishes are unknown, the agent must act in the principal's best interest. In determining the principal's best interest, the agent is to consider the principal's personal values to the extent known to the agent. The Act does not prescribe a detailed list of factors for determining the principal's best interest but instead grants the agent discretion to ascertain and weigh the factors likely to be of importance to the principal. [Adapted from Unif. Health-Care Decisions Act § 2(e) comment (1993).]

§ 4685. Agent's priority

4685. Unless the power of attorney for health care provides otherwise, the agent designated in the power of attorney who is known to the health care provider to be reasonably available and willing to make health care decisions has priority over any other person in making health care decisions for the principal.

Comment. Section 4685 continues without substantive change the first part of former Section 4720(a) and part of former Section 4652(a) relating to availability, willingness, and ability of agents. This section gives the agent priority over others, including a conservator or statutory

surrogate, to make health care decisions if the agent is known to the health care provider to be available and willing to act. See Section 4710 (statutory surrogate's authority dependent on appointment and availability of agent). The power of attorney may vary this priority, as recognized in the introductory clause, and the rule of this section is subject to a contrary court order. See Section 4766. In part, this section serves the same purpose as Section 6(b) of the Uniform Health-Care Decisions Act (1993).

See also Sections 4607 ("agent" defined), 4617 ("health care decision" defined), 4621 ("health care provider" defined), 4629 ("power of attorney for health care" defined), 4633 ("principal" defined), 4635 ("reasonably available" defined).

§ 4686. Duration

4686. Unless the power of attorney for health care provides a time of termination, the authority of the agent is exercisable notwithstanding any lapse of time since execution of the power of attorney.

Comment. Section 4686 continues Section 4127, insofar as it applied to powers of attorney for health care, without substantive change. This rule is the same in substance as the second sentence of the official text of Section 2 of the Uniform Durable Power of Attorney Act (1987), Uniform Probate Code Section 5-502 (1991). See Section 2(b) (construction of provisions drawn from uniform acts).

See also Sections 4607 ("agent" defined), 4629 ("power of attorney for health care" defined).

§ 4687. Other authority of person named as agent not affected

4687. Nothing in this division affects any right the person designated as an agent under a power of attorney for health care may have, apart from the power of attorney, to make or participate in making health care decisions for the principal.

Comment. Section 4687 continues former Section 4720(d) without substantive change, and supersedes part of former Section 4652(a). An agent may, without liability, decline to act under the power of attorney. For example, the agent may not be willing to follow the desires of the principal as stated in the power of attorney because of changed circumstances. This section makes clear that, in such a case, the person may make or participate in making health care decisions for the principal without being bound by the stated desires of the principal to the extent

that the person designated as the agent has the right under the applicable law apart from the power of attorney. See Section 4722(b)(3) (patient representative on surrogate committee).

See also Sections 4607 (“agent” defined), 4617 (“health care decision” defined), 4629 (“power of attorney for health care” defined), 4633 (“principal” defined).

§ 4688. Relation to general agency law

4688. Where this division does not provide a rule governing agents under powers of attorney, the law of agency applies.

Comment. Section 4688 is analogous to Section 4051 in the Power of Attorney Law. Under this section, reference may be made to relevant agency principles set forth in case law and statutes. See, e.g., Civ. Code §§ 2019 *et seq.*, 2295 *et seq.*; Prob. Code § 4000 *et seq.* (Power of Attorney Law).

Article 3. Revocation of Advance Directives

§ 4695. Revocation of advance health care directive

4695. (a) A patient having capacity may revoke the designation of an agent only by a signed writing or by personally informing the supervising health care provider.

(b) A patient having capacity may revoke all or part of an advance health care directive, other than the designation of an agent, at any time and in any manner that communicates an intent to revoke.

Comment. Section 4695 is drawn from Section 3(a)-(b) of the Uniform Health-Care Decisions Act (1993). This section replaces former Section 4727(a) (revocation rules applicable to durable power of attorney for health care) and former Health and Safety Code Section 7188(a) (revocation under former Natural Death Act). This section also supersedes Sections 4150 and 4151 in the Power of Attorney Law to the extent they applied to powers of attorney for health care. The principal may revoke the designation or authority only if, at the time of revocation, the principal has sufficient capacity to make a power of attorney for health care. The burden of proof is on the person who seeks to establish that the principal did not have capacity to revoke the designation or authority. See Section 4657 (presumption of capacity). “Personally

informing,” as used in subdivision (a), includes both oral and written communications.

See also Sections 4605 (“advance health care directive” defined), 4625 (“patient” defined), 4629 (“power of attorney for health care” defined), 4641 (“supervising health care provider” defined).

Background from Uniform Act. Section 3(b) provides that an individual may revoke any portion of an advance health-care directive at any time and in any manner that communicates an intent to revoke. However, a more restrictive standard applies to the revocation of the portion of a power of attorney for health care relating to the designation of an agent. Section 3(a) provides that an individual may revoke the designation of an agent only by a signed writing or by personally informing the supervising health-care provider. This higher standard is justified by the risk of a false revocation of an agent’s designation or of a misinterpretation or miscommunication of a principal’s statement communicated through a third party. For example, without this higher standard, an individual motivated by a desire to gain control over a patient might be able to assume authority to act as agent by falsely informing a health-care provider that the principal no longer wishes the previously designated agent to act but instead wishes to appoint the individual.

The section does not specifically address amendment of an advance health-care directive because such reference is not necessary. Section 3(b) specifically authorizes partial revocation, and Section 3(e) [Prob. Code § 4698] recognizes that an advance health-care directive may be modified by a later directive.

[Adapted from Unif. Health-Care Decisions Act § 3(a)-(b), (e) comment (1993).]

§ 4696. Duty to communicate revocation

4696. A health care provider, agent, conservator, or surrogate who is informed of a revocation of an advance health care directive shall promptly communicate the fact of the revocation to the supervising health care provider and to any health care institution where the patient is receiving care.

Comment. Section 4696 is the same as Section 3(c) of the Uniform Health-Care Decisions Act (1993).

See also Sections 4605 (“advance health care directive” defined), 4607 (“agent” defined), 4613 (“conservator” defined), 4619 (“health care institution” defined), 4621 (“health care provider” defined), 4625

(“patient” defined), 4641 (“supervising health care provider” defined), 4643 (“surrogate” defined).

Background from Uniform Act. Section 3(c) requires any health-care provider, agent, [conservator] or surrogate who is informed of a revocation to promptly communicate that fact to the supervising health-care provider and to any health-care institution at which the patient is receiving care. The communication triggers the Section 7(b) [Prob. Code § 4731] obligation of the supervising health-care provider to record the revocation in the patient’s health-care record and reduces the risk that a health-care provider or agent, [conservator] or surrogate will rely on a health-care directive that is no longer valid. [Adapted from Unif. Health-Care Decisions Act § 3(c) comment (1993).]

§ 4697. Effect of dissolution or annulment

4697. (a) If after executing a power of attorney for health care the principal’s marriage to the agent is dissolved or annulled, the principal’s designation of the former spouse as an agent to make health care decisions for the principal is revoked.

(b) If the agent’s authority is revoked solely by subdivision (a), it is revived by the principal’s remarriage to the agent.

Comment. Section 4697 continues former Section 4727(e) without substantive change. Subdivision (a) is comparable to Section 3(d) of the Uniform Health-Care Decisions Act (1993), but does not revoke the designation of an agent on legal separation. For special rules applicable to a federal “absentee” (as defined in Section 1403), see Section 3722.

This section is subject to limitation by the power of attorney. See Section 4681 (limitations expressed in power of attorney for health care). See also Sections 4607 (“agent” defined), 4617 (“health care decision” defined), 4629 (“power of attorney for health care” defined), 4633 (“principal” defined).

§ 4698. Effect of later advance directive on earlier advance directive

4698. An advance health care directive that conflicts with an earlier advance directive revokes the earlier advance directive to the extent of the conflict.

Comment. Section 4698 is the same as Section 3(e) of the Uniform Health-Care Decisions Act (1993) and supersedes former Section

4727(d). This section is also consistent with former Health and Safety Code Section 7193 (Natural Death Act).

See also Section 4605 (“advance health care directive” defined).

Background from Uniform Act. Section 3(e) establishes a rule of construction permitting multiple advance health-care directives to be construed together in order to determine the individual’s intent, with the later advance health-care directive superseding the former to the extent of any inconsistency. [Adapted from Unif. Health-Care Decisions Act § 3(e) comment (1993).]

CHAPTER 2. ADVANCE HEALTH CARE DIRECTIVE FORMS

§ 4700. Authorization for statutory form of advance directive

4700. The form provided in Section 4701 may, but need not, be used to create an advance health care directive. The other sections of this division govern the effect of the form or any other writing used to create an advance health care directive. An individual may complete or modify all or any part of the form in Section 4701.

Comment. Section 4700 is drawn from the introductory paragraph of Section 4 of the Uniform Health-Care Decisions Act (1993). This section supersedes former Section 4779 (use of other forms).

See also Section 4605 (“advance health care directive” defined).

§ 4701. Optional form of advance directive

4701. The statutory advance health care directive form is as follows:

ADVANCE HEALTH CARE DIRECTIVE (California Probate Code Section 4701)

Explanation

You have the right to give instructions about your own health care. You also have the right to name someone else to make health care decisions for you. This form lets you do either or both of these things. It also lets you express your

wishes regarding donation of organs and the designation of your primary physician. If you use this form, you may complete or modify all or any part of it. You are free to use a different form.

Part 1 of this form is a power of attorney for health care. Part 1 lets you name another individual as agent to make health care decisions for you if you become incapable of making your own decisions or if you want someone else to make those decisions for you now even though you are still capable. You may also name an alternate agent to act for you if your first choice is not willing, able, or reasonably available to make decisions for you. (Your agent may not be an operator or employee of a community care facility or a residential care facility where you are receiving care, or your supervising health care provider or employee of the health care institution where you are receiving care, unless your agent is related to you or is a co-worker.)

Unless the form you sign limits the authority of your agent, your agent may make all health care decisions for you. This form has a place for you to limit the authority of your agent. You need not limit the authority of your agent if you wish to rely on your agent for all health care decisions that may have to be made. If you choose not to limit the authority of your agent, your agent will have the right to:

- (a) consent or refuse consent to any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a physical or mental condition;
- (b) select or discharge health care providers and institutions;
- (c) approve or disapprove diagnostic tests, surgical procedures, and programs of medication;
- (d) direct the provision, withholding, or withdrawal of artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation; and

- (e) make anatomical gifts, authorize an autopsy, and direct disposition of remains.

Part 2 of this form lets you give specific instructions about any aspect of your health care, whether or not you appoint an agent. Choices are provided for you to express your wishes regarding the provision, withholding, or withdrawal of treatment to keep you alive, as well as the provision of pain relief. Space is also provided for you to add to the choices you have made or for you to write out any additional wishes. If you are satisfied to allow your agent to determine what is best for you in making end-of-life decisions, you need not fill out Part 2 of this form.

Part 3 of this form lets you express an intention to donate your bodily organs and tissues following your death.

Part 4 of this form lets you designate a physician to have primary responsibility for your health care.

After completing this form, sign and date the form at the end. It is recommended but not required that you request two other adults to sign as witnesses. Give a copy of the signed and completed form to your physician, to any other health care providers you may have, to any health care institution at which you are receiving care, and to any health care agents you have named. You should talk to the person you have named as agent to make sure that he or she understands your wishes and is willing to take the responsibility.

You have the right to revoke this advance health care directive or replace this form at any time.

* * * * *

PART 1
POWER OF ATTORNEY FOR HEALTH CARE

(1.1) DESIGNATION OF AGENT: I designate the following individual as my agent to make health care decisions for me:

(name of individual you choose as agent)

(address) (city) (state) (zip code)

(home phone) (work phone)

OPTIONAL: If I revoke my agent’s authority or if my agent is not willing, able, or reasonably available to make a health care decision for me, I designate as my first alternate agent:

(name of individual you choose as first alternate agent)

(address) (city) (state) (zip code)

(home phone) (work phone)

OPTIONAL: If I revoke the authority of my agent and first alternate agent or if neither is willing, able, or reasonably available to make a health care decision for me, I designate as my second alternate agent:

(name of individual you choose as second alternate agent)

(address) (city) (state) (zip code)

(home phone) (work phone)

(1.2) AGENT’S AUTHORITY: My agent is authorized to make all health care decisions for me, including decisions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care to keep me alive, except as I state here:

(Add additional sheets if needed.)

(1.3) WHEN AGENT’S AUTHORITY BECOMES EFFECTIVE: My agent’s authority becomes effective when my primary physician determines that I am unable to make my own health care decisions unless I mark the following box. If I mark this box , my agent’s authority to make health care decisions for me takes effect immediately.

(1.4) AGENT’S OBLIGATION: My agent shall make health care decisions for me in accordance with this power of attorney for health care, any instructions I give in Part 2 of this form, and my other wishes to the extent known to my agent. To the extent my wishes are unknown, my agent shall make health care decisions for me in accordance with what my agent determines to be in my best interest. In determining my best interest, my agent shall consider my personal values to the extent known to my agent.

(1.5) AGENT'S POST-DEATH AUTHORITY: My agent is authorized to make anatomical gifts, authorize an autopsy, and direct disposition of my remains, except as I state here or in Part 3 of this form:

(Add additional sheets if needed.)

(1.6) NOMINATION OF CONSERVATOR: If a conservator of my person needs to be appointed for me by a court, I nominate the agent designated in this form. If that agent is not willing, able, or reasonably available to act as conservator, I nominate the alternate agents whom I have named, in the order designated.

PART 2

INSTRUCTIONS FOR HEALTH CARE

If you fill out this part of the form, you may strike any wording you do not want.

(2.1) END-OF-LIFE DECISIONS: I direct that my health care providers and others involved in my care provide, withhold, or withdraw treatment in accordance with the choice I have marked below:

(a) Choice Not To Prolong Life

I do not want my life to be prolonged if (1) I have an incurable and irreversible condition that will result in my death within a relatively short time, (2) I become unconscious and, to a reasonable degree of medical certainty, I will not regain consciousness, or (3) the likely risks and burdens of treatment would outweigh the expected benefits, OR

(b) Choice To Prolong Life

I want my life to be prolonged as long as possible within the limits of generally accepted health care standards.

(2.2) RELIEF FROM PAIN: Except as I state in the following space, I direct that treatment for alleviation of pain or discomfort be provided at all times, even if it hastens my death:

(Add additional sheets if needed.)

(2.3) OTHER WISHES: (If you do not agree with any of the optional choices above and wish to write your own, or if you wish to add to the instructions you have given above, you may do so here.) I direct that:

(Add additional sheets if needed.)

PART 3
DONATION OF ORGANS AT DEATH
(OPTIONAL)

(3.1) Upon my death (mark applicable box):

- (a) I give any needed organs, tissues, or parts, OR
- (b) I give the following organs, tissues, or parts only.

(c) My gift is for the following purposes (strike any of the following you do not want):

- (1) Transplant

PART 5

(5.1) EFFECT OF COPY: A copy of this form has the same effect as the original.

(5.2) SIGNATURES: Sign and date the form here:

(date)	(sign your name)
(address)	(print your name)
(city) (state)	

(Optional) SIGNATURES OF WITNESSES:

First witness	Second witness
(print name)	(print name)
(address)	(address)
(city) (state)	(city) (state)
(signature of witness)	(signature of witness)
(date)	(date)

PART 6
SPECIAL WITNESS REQUIREMENT

(6.1) The following statement is required only if you are a patient in a skilled nursing facility — a health care facility that provides the following basic services: skilled nursing care and supportive care to patients whose primary need is for availability of skilled nursing care on an extended basis. The patient advocate or ombudsman must sign the following statement:

Statement of Patient Advocate or Ombudsman

I declare under penalty of perjury under the laws of California that I am a patient advocate or ombudsman as designated by the State Department of Aging and that I am serving as a witness as required by Section 4673 of the Probate Code.

(date)	(sign your name)
(address)	(print your name)
(city)	(state)

Comment. Section 4701 provides the contents of the optional statutory form for the Advance Health Care Directive. Parts 1-5 of this form are drawn from Section 4 of the Uniform Health-Care Decisions Act (1993). This form supersedes the Statutory Form Durable Power of Attorney for Health Care in former Section 4771 and the related rules in former Sections 4772-4774, 4776-4778. Part 6 of this form continues a portion of the former statutory form applicable to patients in skilled nursing facilities.

Background from Uniform Act. The optional form set forth in this section incorporates the Section 2 [Prob. Code § 4670 *et seq.*]

requirements applicable to advance health-care directives. There are four parts to the form. An individual may complete all or any parts of the form. Any part of the form left blank is not to be given effect. For example, an individual may complete the instructions for health care part of the form alone. Or an individual may complete the power of attorney for health care part of the form alone. Or an individual may complete both the instructions and power of attorney for health care parts of the form. An individual may also, but need not, complete the parts of the form pertaining to donation of bodily organs and tissue and the designation of a primary physician.

Part 1, the power of attorney for health care, appears first on the form in order to ensure to the extent possible that it will come to the attention of a casual reader. This reflects the reality that the appointment of an agent is a more comprehensive approach to the making of health-care decisions than is the giving of an individual instruction, which cannot possibly anticipate all future circumstances which might arise.

Part [1.1] of the power of attorney for health care form requires only the designation of a single agent, but with opportunity given to designate a single first alternate and a single second alternate, if the individual chooses. No provision is made in the form for the designation of co-agents in order not to encourage the practice. Designation of co-agents is discouraged because of the difficulties likely to be encountered if the co-agents are not all readily available or do not agree. If co-agents are appointed, the instrument should specify that either is authorized to act if the other is not reasonably available. It should also specify a method for resolving disagreements.

Part [1.2] of the power of attorney for health care form grants the agent authority to make all health-care decisions for the individual subject to any limitations which the individual may state in the form. Reference is made to artificial nutrition and hydration and other forms of treatment to keep an individual alive in order to ensure that the individual is aware that those are forms of health care that the agent would have the authority to withdraw or withhold absent specific limitation.

Part [1.3] of the power of attorney for health care form provides that the agent's authority becomes effective upon a determination that the individual lacks capacity, but as authorized by Section 2(c) [Prob. Code § 4682] a box is provided for the individual to indicate that the authority of the agent takes effect immediately.

Part [1.4] of the power of attorney for health care form directs the agent to make health-care decisions in accordance with the power of attorney, any instructions given by the individual in Part 2 of the form, and the individual's other wishes to the extent known to the agent. To the extent the individual's wishes in the matter are not known, the agent is to

make health-care decisions based on what the agent determines to be in the individual's best interest. In determining the individual's best interest, the agent is to consider the individual's personal values to the extent known to the agent. Section 2(e) imposes this standard, whether or not it is included in the form, but its inclusion in the form will bring it to the attention of the individual granting the power, to the agent, to any [conservator] or surrogate, and to the individual's health-care providers.

[Part 1.5 implements Probate Code Section 4683.]

Part [1.6] of the power of attorney for health care form nominates the agent, if available, able, and willing to act, otherwise the alternate agents in order of priority stated, as [conservators] of the person for the individual. This provision is included in the form for two reasons. First, if an appointment of a [conservator] becomes necessary the agent is the one whom the individual would most likely want to serve in that role. Second, the nomination of the agent as [conservator] will reduce the possibility that someone other than the agent will be appointed as [conservator] who could use the position to thwart the agent's authority.

Because the variety of treatment decisions to which health-care instructions may relate is virtually unlimited, Part 2 of the form does not attempt to be comprehensive, but is directed at the types of treatment for which an individual is most likely to have special wishes. Part [2.1] of the form, entitled "End-of-Life Decisions," provides two alternative choices for the expression of wishes concerning the provision, withholding, or withdrawal of treatment. Under the first choice, the individual's life is not to be prolonged if the individual has an incurable and irreversible condition that will result in death within a relatively short time, if the individual becomes unconscious and, to a reasonable degree of medical certainty, will not regain consciousness, or if the likely risks and burdens of treatment would outweigh the expected benefits. Under the second choice, the individual's life is to be prolonged within the limits of generally accepted health-care standards.... Part [2.2] of the form provides space for an individual to specify any circumstance when the individual would prefer not to receive pain relief. Because the choices provided in Parts [2.1-2.2] do not cover all possible situations, Part [2.3] of the form provides space for the individual to write out his or her own instructions or to supplement the instructions given in the previous subparts of the form. Should the space be insufficient, the individual is free to add additional pages.

The health-care instructions given in Part 2 of the form are binding on the agent, any [conservator], any surrogate, and, subject to exceptions specified in Section 7(e)-(f) [Prob. Code §§ 4734-4735], on the individual's health-care providers. Pursuant to Section 7(d) [Prob. Code § 4733], a health-care provider must also comply with a reasonable

interpretation of those instructions made by an authorized agent, [conservator], or surrogate.

Part 3 of the form provides the individual an opportunity to express an intention to donate bodily organs and tissues at death. The options provided are derived from a suggested form in the Comment to Section 2 of the Uniform Anatomical Gift Act (1987). [See Health & Safety Code § 7150 *et seq.*]

Part 4 of the form provides space for the individual to designate a primary physician should the individual choose to do so. Space is also provided for the designation of an alternate primary physician should the first designated physician not be available, able, or willing to act.

[Part 5.1] of the form conforms with the provisions of Section 12 [Prob. Code § 4660] by providing that a copy of the form has the same effect as the original.

The Act does not require witnessing, [except as provided in Prob. Code § 4673,] but to encourage the practice [Part 5.2 of] the form provides space for the signatures of two witnesses.

The form does not require formal acceptance by an agent. Formal acceptance by an agent has been omitted not because it is an undesirable practice but because it would add another stage to executing an advance health-care directive, thereby further reducing the number of individuals who will follow through and create directives. However, practitioners who wish to adapt this form for use by their clients are strongly encouraged to add a formal acceptance. Designated agents have no duty to act until they accept the office either expressly or through their conduct. Consequently, requiring formal acceptance reduces the risk that a designated agent will decline to act when the need arises. Formal acceptance also makes it more likely that the agent will become familiar with the principal's personal values and views on health care. While the form does not require formal acceptance, the explanation to the form does encourage principals to talk to the person they have named as agent to make certain that the designated agent understands their wishes and is willing to take the responsibility.

[Adapted from Unif. Health-Care Decisions Act § 4 comment (1993).]

CHAPTER 3. HEALTH CARE SURROGATES

§ 4710. Authority of surrogate to make health care decisions

4710. A surrogate who is designated or selected under this chapter may make health care decisions for a patient if all of the following conditions are satisfied:

(a) The patient has been determined by the primary physician to lack capacity.

(b) No agent has been designated under a power of attorney for health care and no conservator of the person has been appointed with authority to make health care decisions, or the agent or conservator is not reasonably available.

Comment. Section 4710 is drawn from Section 5(a) of the Uniform Health-Care Decisions Act (1993). Section 4658 provides for capacity determinations by the primary physician under this division. Both the patient and the surrogate must be adults. See Sections 4625 (“patient” defined), 4643 (“surrogate” defined). “Adult” includes an emancipated minor. See Fam. Code §§ 7002 (emancipation), 7050 (emancipated minor considered as adult for consent to medical, dental, or psychiatric care).

See also Sections 4609 (“capacity” defined), 4613 (“conservator” defined), 4615 (“health care” defined), 4617 (“health care decision” defined), 4625 (“patient” defined), 4629 (“power of attorney for health care” defined), 4631 (“primary physician” defined), 4635 (“reasonably available” defined), 4643 (“surrogate” defined).

Background from Uniform Act. Section 5(a) authorizes a surrogate to make a health-care decision for a patient who is an adult or emancipated minor if the patient lacks capacity to make health-care decisions and if no agent or [conservator] has been appointed or the agent or [conservator] is not reasonably available. Health-care decision making for unemancipated minors is not covered by this section. The subject of consent for treatment of minors is a complex one which in many states is covered by a variety of statutes and is therefore left to other state law. [Adapted from Unif. Health-Care Decisions Act § 5(a) comment (1993).]

§ 4711. Patient’s designation of surrogate

4711. A patient may designate an individual as a surrogate to make health care decisions by personally informing the supervising health care provider. An oral designation of a surrogate is effective only during the course of treatment or illness or during the stay in the health care institution when the designation is made.

Comment. The first sentence of Section 4711 is drawn from Section 5(b) of the Uniform Health-Care Decisions Act (1993). Both the patient and the surrogate must be adults. See Sections 4625 (“patient” defined),

4643 (“surrogate” defined). “Personally informing,” as used in this section, includes both oral and written communications. The second sentence is intended to guard against the possibility of giving effect to obsolete oral statements entered in the patient’s record.

See also Sections 4617 (“health care decision” defined), 4619 (“health care institution” defined), 4625 (“patient” defined), 4635 (“reasonably available” defined), 4641 (“supervising health care provider” defined), 4643 (“surrogate” defined).

Background from Uniform Act. While a designation of an agent in a written power of attorney for health care is preferred, situations may arise where an individual will not be in a position to execute a power of attorney for health care. In that event, subsection (b) affirms the principle of patient autonomy by allowing an individual to designate a surrogate by personally informing the supervising health-care provider. The supervising health-care provider would then, in accordance with Section 7(b) [Prob. Code § 4731], be obligated to promptly record the designation in the individual’s health-care record. An oral designation of a surrogate made by a patient directly to the supervising health-care provider revokes a previous designation of an agent. See Section 3(a) [Prob. Code § 4695(a)]. [Adapted from Unif. Health-Care Decisions Act § 5(b) comments (1993).]

§ 4712. Selection of statutory surrogate

4712. (a) Subject to Section 4710, if no surrogate has been designated under Section 4711 or if the designated surrogate is not reasonably available, the primary physician may select a surrogate to make health care decisions for the patient from among the following adults with a relationship to the patient:

(1) The spouse, unless legally separated.

(2) An adult in a long-term relationship of indefinite duration with the patient in which the individual has demonstrated an actual commitment to the patient similar to the commitment of a spouse and in which the individual and the patient consider themselves to be responsible for each other’s well-being and reside or have been residing together. This individual may be known as a domestic partner.

(3) Children.

(4) Parents.

(5) Brothers and sisters.

(6) Grandchildren.

(7) Close friends.

(b) The primary physician shall select the surrogate, with the assistance of other health care providers or institutional committees, in the order of priority set forth in subdivision (a), subject to the following conditions:

(1) Where there are multiple possible surrogates at the same priority level, the primary physician shall select the individual who appears after a good faith inquiry to be best qualified.

(2) The primary physician may select as the surrogate an individual who is ranked lower in priority if, in the primary physician's judgment, the individual is best qualified to serve as the patient's surrogate.

(c) In determining the individual best qualified to serve as the surrogate under this section, the following factors shall be considered:

(1) Whether the proposed surrogate appears to be best able to make decisions in accordance with Section 4714.

(2) The degree of regular contact with the patient before and during the patient's illness.

(3) Demonstrated care and concern for the patient.

(4) Familiarity with the patient's personal values.

(5) Availability to visit the patient.

(6) Availability to engage in face-to-face contact with health care providers for the purpose of fully participating in the health care decisionmaking process.

(d) The primary physician may require a surrogate or proposed surrogate (1) to provide information to assist in making the determinations under this section and (2) to provide information to family members and other persons concerning the selection of the surrogate and communicate with them concerning health care decisions for the patient.

(e) The primary physician shall document in the patient's health care record the reasons for selecting the surrogate.

Comment. Section 4712 is a new provision, drawn in part from West Virginia law and the Uniform Health-Care Decisions Act (1993). See W.Va. Code § 16-30B-7 (1997); Unif. Health-Care Decisions Act § 5(b)-(c) (1993). Subdivision (a)(2) is drawn from New Mexico law. See N.M. Stat. Ann. § 24-7A-5(B)(2) (Westlaw 1998). "Adult" includes an emancipated minor. See Fam. Code § 7002 (emancipation). A prospective surrogate and other persons may also seek judicial relief as provided in Sections 4765-4766.

See also Sections 4617 ("health care decision" defined), 4625 ("patient" defined), 4635 ("reasonably available" defined), 4641 ("supervising health care provider" defined), 4643 ("surrogate" defined).

§ 4713. Selection of statutory surrogate

4713. (a) The surrogate designated or selected under this chapter shall promptly communicate his or her assumption of authority to all adults described in paragraphs (1) to (5), inclusive, of subdivision (a) of Section 4712 who can readily be contacted.

(b) The supervising health care provider, in the case of a surrogate designation under Section 4711, or the primary physician, in the case of a surrogate selection under Section 4712, shall inform the surrogate of the duty under subdivision (a).

Comment. Subdivision (a) of Section 4713 is drawn from Section 5(d) of the Uniform Health-Care Decisions Act (1993). The persons required to be notified are the spouse, domestic partner, adult children, parents, and adult siblings. See Section 4712(a)(1)-(5). There is no statutory duty to notify the class of grandchildren or close friends. See Section 4712(a)(6)-(7). However, all surrogates have the duty to notify under subdivision (a), regardless of whether they would have a right to notice.

Subdivision (b) recognizes that the supervising health care provider or primary physician is more likely to know of the duty in subdivision (a) than the surrogate, and so is in a position to notify the surrogate of the duty.

See also Sections 4629 ("primary physician" defined), 4639 ("supervising health care provider" defined), 4643 ("surrogate" defined).

Background from Uniform Act. Section 5(d) [Prob. Code § 4713(a)] requires a surrogate who assumes authority to act to immediately so notify [the persons described in subdivision (a)(1)-(5)] who in given circumstances would be eligible to act as surrogate. Notice to the specified family members will enable them to follow health-care developments with respect to their now incapacitated relative. It will also alert them to take appropriate action, including the appointment of a [conservator] or the commencement of judicial proceedings under Section 14 [Prob. Code § 4750 *et seq.*], should the need arise. [Adapted from Unif. Health-Care Decisions Act § 5(d) comment (1993).]

§ 4714. Standard governing surrogate's health care decisions

4714. A surrogate shall make a health care decision in accordance with the patient's individual health care instructions, if any, and other wishes to the extent known to the surrogate. Otherwise, the surrogate shall make the decision in accordance with the surrogate's determination of the patient's best interest. In determining the patient's best interest, the surrogate shall consider the patient's personal values to the extent known to the surrogate.

Comment. Section 4714 is drawn from Section 5(f) of the Uniform Health-Care Decisions Act (1993). This standard is consistent with the health care decisionmaking standard applicable to agents. See Section 4684.

See also Sections 4617 ("health care decision" defined), 4623 ("individual health care instruction" defined), 4625 ("patient" defined), 4643 ("surrogate" defined).

Background from Uniform Act. Section 5(f) imposes on surrogates the same standard for health-care decision making as is prescribed for agents in Section 2(e) [Prob. Code § 4684]. The surrogate must follow the patient's individual instructions and other expressed wishes to the extent known to the surrogate. To the extent such instructions or other wishes are unknown, the surrogate must act in the patient's best interest. In determining the patient's best interest, the surrogate is to consider the patient's personal values to the extent known to the surrogate. [Adapted from Unif. Health-Care Decisions Act § 5(f) comment (1993).]

§ 4715. Disqualification of surrogate

4715. A patient having capacity at any time may disqualify another person, including a member of the patient's family, from acting as the patient's surrogate by a signed writing or by personally informing the supervising health care provider of the disqualification.

Comment. Section 4715 is drawn from Section 5(h) of the Uniform Health-Care Decisions Act (1993). See Section 4731 (duty to record surrogate's disqualification). "Personally informing," as used in this section, includes both oral and written communications.

See also Sections 4625 ("patient" defined), 4641 ("supervising health care provider" defined), 4643 ("surrogate" defined).

Background from Uniform Act. Section 5(h) permits an individual to disqualify any family member or other individual from acting as the individual's surrogate, including disqualification of a surrogate who was orally designated. [Adapted from Unif. Health-Care Decisions Act § 5(h) comment (1993).]

§ 4716. Reassessment of surrogate selection

4716. (a) If a surrogate selected pursuant to Section 4712 is not reasonably available, the surrogate may be replaced.

(b) If an individual who ranks higher in priority under subdivision (a) of Section 4712 relative to a selected surrogate becomes reasonably available, the individual with higher priority may be substituted for the selected surrogate unless the primary physician determines that the lower ranked individual is best qualified to serve as the surrogate.

Comment. Section 4716 is drawn from West Virginia law. See W. Va. Code § 16-30B-7 (1997). A surrogate is replaced in the circumstances described in this section by applying the rules in Section 4712. The determination of whether a surrogate has become unavailable or whether a higher priority potential surrogate has become reasonably available is made by the primary physician under Section 4712 and this section. Accordingly, a person who believes it is appropriate to reassess the surrogate selection would need to communicate with the primary physician.

See also Sections 4631 ("primary physician" defined), 4635 ("reasonably available" defined), 4643 ("surrogate" defined).

CHAPTER 4. HEALTH CARE DECISIONS FOR PATIENTS WITHOUT SURROGATES

§ 4720. Application of chapter

4720. This chapter applies where a health care decision needs to be made for a patient and all of the following conditions are satisfied:

(a) The patient has been determined by the primary physician to lack capacity.

(b) No agent has been designated under a power of attorney for health care and no conservator of the person has been appointed with authority to make health care decisions, or the agent or conservator is not reasonably available.

(c) No surrogate can be selected under Chapter 3 (commencing with Section 4710) or the surrogate is not reasonably available.

(d) No dispositive individual health care instruction is in the patient's record.

Comment. Section 4720 is new. The procedure in this chapter is drawn in part from and supersedes former Health and Safety Code Section 1418.8 applicable to medical interventions in long-term care facilities. This chapter does not apply to emergency health care. See Section 4651(b)(2).

See also Sections 4607 ("agent" defined), 4609 ("capacity" defined), 4613 ("conservator" defined), 4617 ("health care decision" defined), 4623 ("individual health care instruction" defined), 4625 ("patient" defined), 4631 ("primary physician" defined), 4635 ("reasonably available" defined), 4643 ("surrogate" defined).

§ 4721. Referral to surrogate committee

4721. A patient's primary physician may obtain approval for a proposed health care decision by referring the matter to a surrogate committee before the health care decision is implemented.

Comment. Section 4721 is new. It supersedes former Health and Safety Code Section 1418.8(d) applicable to medical interventions in long-term care facilities. The procedure for making health care decisions

on behalf of incapacitated adults with no other surrogate decisionmakers is optional and it does not displace any other means for making such decisions. See, e.g., Section 3200 *et seq.* (court authorized health care decisions). The scope of a health care decision depends on the circumstances and may include a course of treatment. See Section 4617 Comment.

See also Sections 4617 (“health care decision” defined), 4625 (“patient” defined), 4631 (“primary physician” defined), 4635 (“reasonably available” defined), 4643 (“surrogate” defined).

§ 4722. Composition of surrogate committee

4722. (a) A surrogate committee may be established by the health care institution. If a surrogate committee has not been established by the patient’s health care institution, or if the patient is not a patient in a health care institution, the surrogate committee may be established by the county health officer or as otherwise determined by the county board of supervisors.

(b) The surrogate committee shall include the following individuals:

(1) The patient’s primary physician.

(2) A professional nurse with responsibility for the patient and with knowledge of the patient’s condition.

(3) A patient representative or community member. The patient representative may be a family member or friend of the patient who is unable to take full responsibility for the patient’s health care decisions, but has agreed to serve on the surrogate committee. A community member is an adult who is not employed by or regularly associated with the primary physician, the health care institution, or employees of the health care institution.

(c) In cases involving withholding or withdrawing life-sustaining treatment or other critical health care decisions, in addition to the individuals described in subdivision (b), the surrogate committee shall include a member of the health care institution’s ethics committee or an outside ethics consultant.

(d) This section provides minimum guidelines for the composition of the surrogate committee and is not intended to restrict participation by other appropriate persons, including health care institution staff in disciplines as determined by the patient's needs.

Comment. Section 4722 is new. Subdivision (a) provides for establishment of surrogate committees.

Subdivision (b) is drawn in part from provisions of former Health and Safety Code Section 1418.8(e)-(f) applicable to medical interventions in long-term care facilities. Subdivision (b)(3) makes clear that a person who may be qualified to serve as a surrogate under Chapter 3 (commencing with Section 4710) may still participate in health care decisionmaking as a patient representative. As provided in subdivision (b), the surrogate committee must always include at least three persons, the primary physician, a professional nurse, and a patient representative or community member. Subdivision (c) requires an additional ethics advisor in cases involving life-sustaining treatment or other critical health care decisions. The statute does not attempt to define "critical" health care decisions because of the vast variety of factual circumstances. Routine medical interventions of a type governed by former Health and Safety Code Section 1418.8 would generally not be included in the class of critical health care decisions. However, major surgery, amputation, and treatments involving a significant risk should require participation of an ethicist under subdivision (c).

See also Sections 4615 ("health care" defined), 4617 ("health care decision" defined), 4619 ("health care institution" defined), 4625 ("patient" defined), 4631 ("primary physician" defined).

§ 4723. Conduct and standards of review by surrogate committee

4723. (a) The surrogate committee's review of proposed health care shall include all of the following:

(1) A review of the primary physician's assessment of the patient's condition.

(2) The reason for the proposed health care decision.

(3) A discussion of the desires of the patient, if known. To determine the desires of the patient, the surrogate committee shall interview the patient, if the patient is capable of communicating, review the patient's medical records, and

consult with family members or friends, if any have been identified.

(4) The type of health care to be administered in the patient's care, including its probable frequency and duration.

(5) The probable impact on the patient's condition, with and without administration of the proposed health care.

(6) Reasonable alternative health care decisions considered or administered, and reasons for their discontinuance or inappropriateness.

(b) The surrogate committee shall periodically evaluate the results of an approved health care decision, as appropriate under applicable standards of health care.

Comment. Section 4723 is new and is patterned after provisions of former Health and Safety Code Section 1418.8(e) applicable to medical interventions in long-term care facilities.

Subdivision (b) generalizes the duty to evaluate periodically under former Health and Safety Code Section 1418.8(g), but does not provide any particular time period, as under former law.

See also Sections 4617 ("health care decision" defined), 4625 ("patient" defined), 4631 ("primary physician" defined), 4722 (composition of surrogate committee).

§ 4724. Decisionmaking by surrogate committee

4724. (a) The surrogate committee shall attempt to reach consensus on proposed health care decisions, but may approve proposed health care decisions by majority vote. However, proposed health care decisions relating to withholding or withdrawing life-sustaining treatment may not be approved if any member of the surrogate committee is opposed.

(b) The surrogate committee shall keep a record of its membership, showing who participated in making a health care decision with regard to a patient, and the result of votes taken, and shall keep a record of its deliberations and conclusions under Section 4723.

Comment. Section 4724 is new. The principle of decisionmaking by a majority in subdivision (a) is consistent with the rule applicable to statutory surrogates under Section 5(e) of the Uniform Health-Care Decisions Act (1993). With respect to medical interventions in long-term care facilities, this section supersedes part of the second sentence of former Health and Safety Code Section 1418.8(e) relating to the “team approach to assessment and care planning.” For the standard governing surrogate decisionmaking generally, see Section 4714. Decisions relating to withholding or withdrawal of life-sustaining treatment are subject to a higher standard. If any surrogate committee member votes against the proposed health care decision, the proposal fails; however, an abstention is not counted as opposition.

Subdivision (b) requires that records be kept of the membership, voting, and deliberations of the surrogate committee. This is in addition to any other recordkeeping requirements applicable under this part.

See also Sections 4617 (“health care decision” defined), 4722 (composition of surrogate committee). For provisions concerning judicial proceedings, see Sections 4765(d) (petitioners), 4766 (purposes of petition).

§ 4725. General surrogate rules applicable to surrogate committee

4725. Provisions applicable to health care decisionmaking, duties, and immunities of surrogates apply to a surrogate committee and its members.

Comment. Section 4725 is new. For provisions applicable to health care surrogates generally, see Chapter 3 (commencing with Section 4710), Section 4741 (immunities of surrogate). See also Section 4653 (mercy killing, assisted suicide, euthanasia not approved). For a list of sections applicable to surrogates, see Section 4643 Comment. For the standard governing surrogate decisionmaking generally, see Section 4714.

See also Sections 4617 (“health care decision” defined), 4643 (“surrogate” defined), 4722 (composition of surrogate committee).

§ 4726. Review of emergency care

4726. In a case subject to this chapter where emergency care is administered without approval by a surrogate committee, if the emergency results in the application of physical or chemical restraints, the surrogate committee shall

meet within one week of the emergency for an evaluation of the health care decision.

Comment. Section 4726 generalizes former Health and Safety Code Section 1418.8(h).

CHAPTER 5. DUTIES OF HEALTH CARE PROVIDERS

§ 4730. Supervising health care provider's duty to communicate

4730. Before implementing a health care decision made for a patient, a supervising health care provider, if possible, shall promptly communicate to the patient the decision made and the identity of the person making the decision.

Comment. Section 4730 is drawn from Section 7(a) of the Uniform Health-Care Decisions Act (1993). The duty to communicate the identity of the decisionmaker also applies to a surrogate committee. See Section 4725 (general surrogate rules applicable to surrogate committee).

See also Sections 4617 ("health care decision" defined), 4625 ("patient" defined), 4641 ("supervising health care provider" defined).

Background from Uniform Act. Section 7(a) further reinforces the Act's respect for patient autonomy by requiring a supervising health-care provider, if possible, to promptly communicate to a patient, prior to implementation, a health-care decision made for the patient and the identity of the person making the decision. [Adapted from Unif. Health-Care Decisions Act § 7(a) comment (1993).]

§ 4731. Supervising health care provider's duty to record relevant information

4731. (a) A supervising health care provider who knows of the existence of an advance health care directive, a revocation of an advance health care directive, or a designation or disqualification of a surrogate, shall promptly record its existence in the patient's health care record and, if it is in writing, shall request a copy. If a copy is furnished, the supervising health care provider shall arrange for its maintenance in the patient's health care record.

(b) A supervising health care provider who knows of a revocation of a power of attorney for health care or a

disqualification of a surrogate shall make a reasonable effort to notify the agent or surrogate of the revocation or disqualification.

Comment. Subdivision (a) of Section 4731 is drawn from Section 7(b) of the Uniform Health-Care Decisions Act (1993). With respect to recording notice of revocation of a power of attorney for health care, this section continues the substance of part of former Section 4727(b). The recordkeeping duty continues part of former Health and Safety Code Section 7186.5(c) (Natural Death Act).

Subdivision (b) continues the substance of part of former Section 4727(b) and applies the same duty to surrogate disqualification.

See also Sections 4605 (“advance health care directive” defined), 4625 (“patient” defined), 4629 (“power of attorney for health care” defined), 4641 (“supervising health care provider” defined), 4643 (“surrogate” defined).

Background from Uniform Act. The recording requirement in Section 7(b) reduces the risk that a health-care provider or institution, or agent, [conservator] or surrogate, will rely on an outdated individual instruction or the decision of an individual whose authority has been revoked. [Adapted from Unif. Health-Care Decisions Act § 7(b) comment (1993).]

§ 4732. Primary physician’s duty to record relevant information

4732. A primary physician who makes or is informed of a determination that a patient lacks or has recovered capacity, or that another condition exists affecting an individual health care instruction or the authority of an agent, conservator of the person, or surrogate, shall promptly record the determination in the patient’s health care record and communicate the determination to the patient, if possible, and to a person then authorized to make health care decisions for the patient.

Comment. Section 4732 is drawn from Section 7(c) of the Uniform Health-Care Decisions Act (1993). This duty also applies to a surrogate committee. See Section 4725 (general surrogate rules applicable to surrogate committee). This duty generally continues recordkeeping duties in former Health and Safety Code Sections 7186.5(c) and 7189 (Natural Death Act).

See also Sections 4607 (“agent” defined), 4609 (“capacity” defined), 4613 (“conservator” defined), 4617 (“health care decision” defined), 4623 (“individual health care instruction” defined), 4625 (“patient” defined), 4631 (“primary physician” defined).

Background from Uniform Act. Section 7(c) imposes recording and communication requirements relating to determinations that may trigger the authority of an agent, [conservator] or surrogate to make health-care decisions on an individual’s behalf. The determinations covered by these requirements are those specified in Sections 2(c)-(d) and 5(a) [Prob. Code §§ 4658, 4682 & 4710 respectively]. [Adapted from Unif. Health-Care Decisions Act § 7(c) comment (1993).]

§ 4733. Duty of health care provider or institution to comply with health care instructions and decisions

4733. Except as provided in Sections 4734 and 4735, a health care provider or health care institution providing care to a patient shall do the following:

(a) Comply with an individual health care instruction of the patient and with a reasonable interpretation of that instruction made by a person then authorized to make health care decisions for the patient.

(b) Comply with a health care decision for the patient made by a person then authorized to make health care decisions for the patient to the same extent as if the decision had been made by the patient while having capacity.

Comment. Section 4733 is drawn from Section 7(d) of the Uniform Health-Care Decisions Act (1993). This section generalizes a duty to comply provided in former Health and Safety Code Section 7187.5 (2d sentence) (Natural Death Act).

See also Sections 4609 (“capacity” defined), 4617 (“health care decision” defined), 4619 (“health care institution” defined), 4621 (“health care provider” defined), 4623 (“individual health care instruction” defined), 4625 (“patient” defined).

Background from Uniform Act. Section 7(d) requires health-care providers and institutions to comply with a patient’s individual instruction and with a reasonable interpretation of that instruction made by a person then authorized to make health-care decisions for the patient. A health-care provider or institution must also comply with a health-care decision made by a person then authorized to make health-care decisions

for the patient to the same extent as if the decision had been made by the patient while having capacity. These requirements help to protect the patient's rights to autonomy and self-determination and validate and seek to effectuate the substitute decision making authorized by the Act. [Adapted from Unif. Health-Care Decisions Act § 7(d) comment (1993).]

§ 4734. Right to decline for reasons of conscience or institutional policy

4734. (a) A health care provider may decline to comply with an individual health care instruction or health care decision for reasons of conscience.

(b) A health care institution may decline to comply with an individual health care instruction or health care decision if the instruction or decision is contrary to a policy of the institution that is expressly based on reasons of conscience and if the policy was timely communicated to the patient or to a person then authorized to make health care decisions for the patient.

Comment. Section 4734 is drawn from Section 7(e) of the Uniform Health-Care Decisions Act (1993).

See also Sections 4615 (“health care” defined), 4619 (“health care institution” defined), 4621 (“health care provider” defined), 4623 (“individual health care instruction” defined), 4625 (“patient” defined).

Background from Uniform Act. Not all instructions or decisions must be honored, however. Section 7(e) [Prob. Code § 4734(a)] authorizes a health-care provider to decline to comply with an individual instruction or health-care decision for reasons of conscience. Section 7(e) also allows a health-care institution to decline to comply with a health-care instruction or decision if the instruction or decision is contrary to a policy of the institution which is expressly based on reasons of conscience and if the policy was timely communicated to the patient or to an individual then authorized to make health-care decisions for the patient. [Adapted from Unif. Health-Care Decisions Act § 7(e) comment (1993).]

§ 4735. Right to decline to provide ineffective care

4735. A health care provider or health care institution may decline to comply with an individual health care instruction or health care decision that requires medically ineffective health

care or health care contrary to generally accepted health care standards applicable to the health care provider or institution.

Comment. Section 4735 is drawn from Section 7(f) of the Uniform Health-Care Decisions Act (1993). This section is a special application of the general rule in Section 4654.

See also Sections 4615 (“health care” defined), 4619 (“health care institution” defined), 4621 (“health care provider” defined), 4623 (“individual health care instruction” defined), 4625 (“patient” defined).

Background from Uniform Act. Section 7(f) [Prob. Code § 4734(b)] further authorizes a health-care provider or institution to decline to comply with an instruction or decision that requires the provision of care which would be medically ineffective or contrary to generally accepted health-care standards applicable to the provider or institution. “Medically ineffective health care,” as used in this section, means treatment which would not offer the patient any significant benefit. [Adapted from Unif. Health-Care Decisions Act § 7(f) comment (1993).]

§ 4736. Duty of declining health care provider or institution

4736. A health care provider or health care institution that declines to comply with an individual health care instruction or health care decision shall do all of the following:

(a) Promptly so inform the patient, if possible, and any person then authorized to make health care decisions for the patient.

(b) Unless the patient or person then authorized to make health care decisions for the patient refuses assistance, immediately make all reasonable efforts to assist in the transfer of the patient to another health care provider or institution that is willing to comply with the instruction or decision.

(c) Provide continuing care to the patient until a transfer can be accomplished or until it appears that a transfer cannot be accomplished. In all cases, appropriate pain relief and other palliative care shall be continued.

Comment. Section 4736 is drawn in part from Section 7(g) of the Uniform Health-Care Decisions Act (1993). This section applies to situations where the health care provider or institution declines to comply under Section 4734 or 4735. This section continues the duty to transfer

provided in former Health and Safety Code Sections 7187.5 (2d sentence) and 7190 (Natural Death Act). Nothing in this section requires administration of ineffective care. See Sections 4654, 4735.

See also Sections 4617 (“health care decision” defined), 4619 (“health care institution” defined), 4621 (“health care provider” defined), 4623 (“individual health care instruction” defined), 4625 (“patient” defined).

Background from Uniform Act. Section 7(g) requires a health-care provider or institution that declines to comply with an individual instruction or health-care decision to promptly communicate the refusal to the patient, if possible, and to any person then authorized to make health-care decisions for the patient. The provider or institution also must provide continuing care to the patient until a transfer can be effected. In addition, unless the patient or person then authorized to make health-care decisions for the patient refuses assistance, the health-care provider or institution must immediately make all reasonable efforts to assist in the transfer of the patient to another health-care provider or institution that is willing to comply with the instruction or decision. [Adapted from Unif. Health-Care Decisions Act § 7(g) comment (1993).]

CHAPTER 6. IMMUNITIES AND LIABILITIES

§ 4740. Immunities of health care provider and institution

4740. A health care provider or health care institution acting in good faith and in accordance with generally accepted health care standards applicable to the health care provider or institution is not subject to civil or criminal liability or to discipline for unprofessional conduct for any actions in compliance with this division, including, but not limited to, any of the following conduct:

(a) Complying with a health care decision of a person apparently having authority to make a health care decision for a patient, including a decision to withhold or withdraw health care.

(b) Declining to comply with a health care decision of a person based on a belief that the person then lacked authority.

(c) Complying with an advance health care directive and assuming that the directive was valid when made and has not been revoked or terminated.

(d) Declining to comply with an individual health care instruction or health care decision, in accordance with Sections 4734 to 4736, inclusive.

Comment. Section 4740 is drawn in part from Section 9(a) of the Uniform Health-Care Decisions Act (1993) and supersedes former Sections 4727(f) and 4750 (durable power of attorney for health care). This section also supersedes former Health and Safety Code Sections 1418.8(k) (medical interventions in nursing homes) and 7190.5 (Natural Death Act). The major categories of actions listed in subdivisions (a)-(d) are given as examples and not by way of limitation on the general rule stated in the introductory paragraph. Hence, the protections of this section apply to selection of a surrogate under Section 4712. This immunity also applies where health care decisions are approved by a surrogate committee. See Section 4725 (general surrogate rules applicable to surrogate committee).

The good faith standard of former law is continued in this section. Like former law, this section protects the health care provider who acts in good faith reliance on a health care decision made by an agent pursuant to this division. The reference to acting in accordance with generally accepted health care standards makes clear that a health care provider is not protected from liability for malpractice. The specific qualifications built into the rules provided in former Section 4750(a) are superseded by the good faith rule in this section and by the affirmative requirements of other provisions. See, e. g., Sections 4683(a) (scope of agent's authority) (compare to second part of introductory language of former Section 4750(a)), 4684 (standard governing agent's health care decisions) (compare to former Section 4750(a)(1)-(2)). See also Section 4733 (duty of health care provider or institution to comply with health care instructions and decisions), 4734 (health care provider's or institution's right to decline), 4736 (duty of declining health care provider or institution).

See also Sections 4605 ("advance health care directive" defined), 4617 ("health care decision" defined), 4619 ("health care institution" defined), 4621 ("health care provider" defined), 4625 ("patient" defined).

Background from Uniform Act. Section 9 [Prob. Code §§ 4740-4741] grants broad protection from liability for actions taken in good faith. Section 9(a) permits a health-care provider or institution to comply with a health-care decision made by a person appearing to have authority to make health-care decisions for a patient; to decline to comply with a health-care decision made by a person believed to be without authority; and to assume the validity of and to comply with an advance health-care directive. Absent bad faith or actions taken that are not in accord with

generally accepted health-care standards, a health-care provider or institution has no duty to investigate a claim of authority or the validity of an advance health-care directive. [Adapted from Unif. Health-Care Decisions Act § 9(a) comment (1993).]

§ 4741. Immunities of agent and surrogate

4741. A person acting as agent or surrogate under this part is not subject to civil or criminal liability or to discipline for unprofessional conduct for health care decisions made in good faith.

Comment. Section 4741 is drawn from Section 9(b) of the Uniform Health-Care Decisions Act (1993). This immunity also applies where health care decisions are approved by a surrogate committee. See Section 4725 (general surrogate rules applicable to surrogate committee).

See also Sections 4607 (“agent” defined), 4617 (“health care decision” defined), 4643 (“surrogate” defined).

Background from Uniform Act. Section 9(b) protects agents and surrogates acting in good faith from liability for making a health-care decision for a patient. Also protected from liability are individuals who mistakenly but in good faith believe they have the authority to make a health-care decision for a patient. For example, an individual who has been designated as agent in a power of attorney for health care might assume authority unaware that the power has been revoked. Or a family member might assume authority to act as surrogate unaware that a family member having a higher priority was reasonably available and authorized to act. [Adapted from Unif. Health-Care Decisions Act § 9(b) comment (1993).]

§ 4742. Statutory damages

4742. (a) A health care provider or health care institution that intentionally violates this part is subject to liability to the aggrieved individual for damages of two thousand five hundred dollars (\$2,500) or actual damages resulting from the violation, whichever is greater, plus reasonable attorney’s fees.

(b) A person who intentionally falsifies, forges, conceals, defaces, or obliterates an individual’s advance health care directive or a revocation of an advance health care directive

without the individual's consent, or who coerces or fraudulently induces an individual to give, revoke, or not to give an advance health care directive, is subject to liability to that individual for damages of ten thousand dollars (\$10,000) or actual damages resulting from the action, whichever is greater, plus reasonable attorney's fees.

(c) The damages provided in this section are cumulative and not exclusive of any other remedies provided by law.

Comment. Subdivisions (a) and (b) of Section 4742 are drawn from Section 10 of the Uniform Health-Care Decisions Act (1993) and supersede former Health and Safety Code Section 7191(a)-(b) (Natural Death Act).

Subdivision (c) continues the rule of former Health and Safety Code Section 7191(g) (Natural Death Act) and is consistent with the uniform act. See Unif. Health-Care Decisions Act § 10 comment (1993).

See also Sections 4605 ("advance health care directive" defined), 4619 ("health care institution" defined), 4621 ("health care provider" defined).

Background from Uniform Act. Conduct which intentionally violates the Act and which interferes with an individual's autonomy to make health-care decisions, either personally or through others as provided under the Act, is subject to civil damages rather than criminal penalties out of a recognition that prosecutions are unlikely to occur. The legislature of an enacting state will have to determine the amount of damages which needs to be authorized in order to encourage the level of potential private enforcement actions necessary to effect compliance with the obligations and responsibilities imposed by the Act. The damages provided by this section do not supersede but are in addition to remedies available under other law. [Adapted from Unif. Health-Care Decisions Act § 10 comment (1993).]

§ 4743. Criminal penalties

4743. Any person who alters or forges a written advance health care directive of another, or willfully conceals or withholds personal knowledge of a revocation of an advance directive, with the intent to cause a withholding or withdrawal of health care necessary to keep the patient alive contrary to the desires of the patient, and thereby directly causes health care necessary to keep the patient alive to be withheld or

withdrawn and the death of the patient thereby to be hastened, is subject to prosecution for unlawful homicide as provided in Chapter 1 (commencing with Section 187) of Title 8 of Part 1 of the Penal Code.

Comment. Section 4743 continues former Section 4726 without substantive change and supersedes former Health and Safety Code Section 7191(c)-(d) (Natural Death Act). References to “principal” have been changed to “patient” to reflect the broader scope of this division, and some surplus language has been omitted. The former incorrect cross-reference to “Title 4” has been corrected.

See also Sections 4605 (“advance health care directive” defined), 4615 (“health care” defined), 4625 (“patient” defined).

PART 3 . JUDICIAL PROCEEDINGS

CHAPTER 1. GENERAL PROVISIONS

§ 4750. Judicial intervention disfavored

4750. Subject to this division:

(a) An advance health care directive is effective and exercisable free of judicial intervention.

(b) A health care decision made by an agent for a principal is effective without judicial approval.

(c) A health care decision made by a surrogate for a patient is effective without judicial approval.

(d) A health care decision made pursuant to Chapter 4 (commencing with Section 4720) is effective without judicial approval.

Comment. This section makes clear that judicial involvement in health care decisionmaking is disfavored. See Section 4650(d) (legislative findings). Subdivision (a) of Section 4750 continues former Section 4900 to the extent it applied to powers of attorney for health care.

Subdivision (b) is drawn from Section 2(f) of the Uniform Health-Care Decisions Act (1993).

Subdivision (c) is drawn from Sections 2(f) and 5(g) of the Uniform Health-Care Decisions Act (1993).

Subdivision (d) is patterned after subdivisions (b) and (c) and is analogous to former Health and Safety Code Section 1418.8(i) (medical interventions for resident of long-term care facility).

See also Sections 4605 (“advance health care directive” defined), 4607 (“agent” defined), 4617 (“health care decision” defined), 4625 (“patient” defined), 4633 (“principal” defined), 4643 (“surrogate” defined).

§ 4751. Cumulative remedies

4751. The remedies provided in this part are cumulative and not exclusive of any other remedies provided by law.

Comment. Section 4751 continues former Section 4901 to the extent it applied to powers of attorney for health care.

§ 4752. Effect of provision in advance directive attempting to limit right to petition

4752. Except as provided in Section 4753, this part is not subject to limitation in an advance health care directive.

Comment. Section 4752 continues former Section 4902 to the extent it applied to powers of attorney for health care.

See also Sections 4605 (“advance health care directive” defined), 4681 (general rule on limitations provided in power of attorney).

§ 4753. Limitations on right to petition

4753. (a) Subject to subdivision (b), an advance health care directive may expressly eliminate the authority of a person listed in Section 4765 to petition the court for any one or more of the purposes enumerated in Section 4766, if both of the following requirements are satisfied:

(1) The advance directive is executed by an individual having the advice of a lawyer authorized to practice law in the state where the advance directive is executed.

(2) The individual’s lawyer signs a certificate stating in substance:

“I am a lawyer authorized to practice law in the state where this advance health care directive was executed, and _____ (insert name) was my client at the time this advance directive was executed. I have advised my

client concerning his or her rights in connection with this advance directive and the applicable law and the consequences of signing or not signing this advance directive, and my client, after being so advised, has executed this advance directive.”

(b) An advance health care directive may not limit the authority of the following persons to petition under this part:

(1) The conservator of the person, with respect to a petition relating to an advance directive, for a purpose specified in subdivision (b) or (d) of Section 4766.

(2) The agent, with respect to a petition relating to a power of attorney for health care, for a purpose specified in subdivision (b) or (c) of Section 4766.

Comment. Section 4753 continues former Section 4903 to the extent it applied to powers of attorney for health care. Subdivision (a) makes clear that a power of attorney may limit the applicability of this part only if it is executed with the advice and approval of the principal’s counsel. This limitation is designed to ensure that the execution of a power of attorney that restricts the remedies of this part is accomplished knowingly by the principal. The inclusion of a provision in the power of attorney making this part inapplicable does not affect the right to resort to any judicial remedies that may otherwise be available.

Subdivision (b) specifies the purposes for which a conservator of the person or an agent may petition the court under this part with respect to a power of attorney for health care. The rights provided in these paragraphs cannot be limited by a provision in an advance directive, but the advance directive may restrict or eliminate the right of any other persons to petition the court under this part if the individual executing the advance directive has the advice of legal counsel and the other requirements of subdivision (a) are met. See Section 4681 (effect of provision in power of attorney attempting to limit right to petition).

Under subdivision (b)(1), despite a contrary provision in the advance directive, the conservator of the person may obtain a determination of whether an advance directive is in effect or has terminated (Section 4766(b)) or whether the authority of an agent or surrogate is terminated (Section 4766(d)). See also Section 4766 Comment.

Under subdivision (b)(2), despite a contrary provision in the power of attorney, the agent may obtain a determination of whether the power of attorney for health care is in effect or has terminated (Section 4766(b)),

or an order passing on the acts or proposed acts of the agent under the power of attorney (Section 4766(c)).

See also Sections 4605 (“advance health care directive” defined), 4607 (“agent” defined), 4613 (“conservator” defined), 4629 (“power of attorney for health care” defined).

§ 4754. Jury trial

4754. There is no right to a jury trial in proceedings under this division.

Comment. Section 4754 continues former Section 4904 to the extent it applied to powers of attorney for health care. This section is consistent with the rule applicable to other fiduciaries. See Sections 1452 (guardianships and conservatorships), 4504 (powers of attorney generally), 7200 (decedents’ estates), 17006 (trusts).

§ 4755. Application of general procedural rules

4755. Except as otherwise provided in this division, the general provisions in Division 3 (commencing with Section 1000) apply to proceedings under this division.

Comment. Section 4755 continues former Section 4905 to the extent it applied to powers of attorney for health care. Like Section 4505, this section provides a cross-reference to the general procedural rules that apply to this division. See, e.g., Sections 1003 (guardian ad litem), 1021 (verification required), 1041 (clerk to set matters for hearing), 1046 (hearing and orders), 1203 (order shortening time for notice), 1215-1216 (service), 1260 (proof of service).

CHAPTER 2. JURISDICTION AND VENUE

§ 4760. Jurisdiction and authority of court or judge

4760. (a) The superior court has jurisdiction in proceedings under this division.

(b) The court in proceedings under this division is a court of general jurisdiction and the court, or a judge of the court, has the same power and authority with respect to the proceedings as otherwise provided by law for a superior court, or a judge of the superior court, including, but not limited to, the matters authorized by Section 128 of the Code of Civil Procedure.

Comment. Section 4760 continues former Section 4920 to the extent it applied to powers of attorney for health care. Like Section 4520, this section is comparable to Section 7050 governing the jurisdiction and authority of the court in proceedings concerning administration of decedents' estates. See Section 7050 Comment.

§ 4761. Basis of jurisdiction

4761. The court may exercise jurisdiction in proceedings under this division on any basis permitted by Section 410.10 of the Code of Civil Procedure.

Comment. Section 4761 continues former Section 4921 to the extent it applied to powers of attorney for health care. Like Section 4521, this section is comparable to Section 17004 (jurisdiction under Trust Law). This section recognizes that the court, in proceedings relating to powers of attorney under this division, may exercise jurisdiction on any basis that is not inconsistent with the California or United States Constitutions, as provided in Code of Civil Procedure Section 410.10. See generally Judicial Council Comment to Code Civ. Proc. § 410.10; Prob. Code § 17004 Comment (basis of jurisdiction under Trust Law).

§ 4762. Jurisdiction over agent or surrogate

4762. Without limiting Section 4761, a person who acts as an agent under a power of attorney for health care or as a surrogate under this division is subject to personal jurisdiction in this state with respect to matters relating to acts and transactions of the agent or surrogate performed in this state or affecting a patient in this state.

Comment. Section 4762 continues former Section 4922 to the extent it applied to powers of attorney for health care, and extends its principles to cover surrogates. Like Section 4522, this section is comparable to Sections 3902(b) (jurisdiction over custodian under Uniform Transfers to Minors Act) and 17003(a) (jurisdiction over trustee). This section is intended to facilitate exercise of the court's power under this part when the court's jurisdiction is properly invoked. As recognized by the introductory clause, constitutional limitations on assertion of jurisdiction apply to the exercise of jurisdiction under this section. Consequently, appropriate notice must be given to an agent or surrogate as a condition of personal jurisdiction. *Cf.* *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

See also Sections 4607 (“agent” defined), 4625 (“patient” defined), 4629 (“power of attorney for health care” defined), 4643 (“surrogate” defined).

§ 4763. Venue

4763. The proper county for commencement of a proceeding under this division shall be determined in the following order of priority:

- (a) The county in which the patient resides.
- (b) The county in which the agent or surrogate resides.
- (c) Any other county that is in the patient’s best interest.

Comment. Section 4763 continues former Section 4923 to the extent it applied to powers of attorney for health care.

See also Sections 4607 (“agent” defined), 4625 (“patient” defined), 4643 (“surrogate” defined).

CHAPTER 3. PETITIONS, ORDERS, APPEALS

§ 4765. Petitioners

4765. Subject to Section 4753, a petition may be filed under this part by any of the following persons:

- (a) The patient.
- (b) The patient’s spouse, unless legally separated.
- (c) A relative of the patient.
- (d) The patient’s agent or surrogate, including a member of a surrogate committee.
- (e) The conservator of the person of the patient.
- (f) The court investigator, described in Section 1454, of the county where the patient resides.
- (g) The public guardian of the county where the patient resides.
- (h) The supervising health care provider or health care institution involved with the patient’s care.
- (i) Any other interested person or friend of the patient.

Comment. Section 4765 continues former Section 4940 to the extent it applied to powers of attorney for health care, with some omissions and

clarifications appropriate for the scope of this division. The purposes for which a person may file a petition under this part are limited by other rules. See Sections 4752 (effect of provision in advance directive attempting to limit right to petition), 4753 (limitations on right to petition), 4766 (petition with respect to advance directive). See also Section 4751 (other remedies not affected).

See also Sections 4607 (“agent” defined), 4613 (“conservator” defined), 4619 (“health care institution” defined), 4625 (“patient” defined), 4641 (“supervising health care provider” defined), 4643 (“surrogate” defined), 4720-4726 (surrogate committees).

§ 4766. Purposes of petition

4766. A petition may be filed under this part for any one or more of the following purposes:

(a) Determining whether or not the patient has capacity to make health care decisions.

(b) Determining whether an advance health care directive is in effect or has terminated.

(c) Determining whether the acts or proposed acts of an agent or surrogate are consistent with the patient’s desires as expressed in an advance health care directive or otherwise made known to the court or, where the patient’s desires are unknown or unclear, whether the acts or proposed acts of the agent or surrogate are in the patient’s best interest.

(d) Declaring that the authority of an agent or surrogate is terminated, upon a determination by the court that the agent or surrogate has made a health care decision for the patient that authorized anything illegal or upon a determination by the court of both of the following:

(1) The agent or surrogate has violated, has failed to perform, or is unfit to perform, the duty under an advance health care directive to act consistent with the patient’s desires or, where the patient’s desires are unknown or unclear, is acting (by action or inaction) in a manner that is clearly contrary to the patient’s best interest.

(2) At the time of the determination by the court, the patient lacks the capacity to execute or to revoke an advance health care directive or disqualify a surrogate.

(e) For the purposes of this section, “surrogate” includes a surrogate committee under Chapter 4 (commencing with Section 4720) of Part 2.

Comment. Section 4766 continues the substance of former Section 4942 to the extent it applied to powers of attorney for health care, and adds language relating to advance directives and surrogates for consistency with the scope of this division.

A determination of capacity under subdivision (a) is subject to the Due Process in Competency Determinations Act. See Sections 810-813.

Under subdivision (c), the patient’s desires as expressed in the power of attorney for health care, individual health care instructions, or otherwise made known to the court provide the standard for judging the acts of the agent or surrogate. See Section 4714 (standard governing surrogate’s health care decisions). Where it is not possible to use a standard based on the patient’s desires because they are not stated in an advance directive or otherwise known or are unclear, subdivision (c) provides that the “patient’s best interest” standard be used.

Subdivision (d) permits the court to terminate health care decisionmaking authority where an agent or surrogate is not complying with the duty to carry out the patient’s desires or act in the patient’s best interest. See Section 4714 (standard governing surrogate’s health care decisions). Subdivision (d) permits termination of authority under an advance health care directive not only where an agent, for example, is acting illegally or failing to perform the duties under a power of attorney or is acting contrary to the known desires of the principal, but also where the desires of the principal are unknown or unclear and the agent is acting in a manner that is clearly contrary to the patient’s best interest. The patient’s desires may become unclear as a result of developments in medical treatment techniques that have occurred since the patient’s desires were expressed, such developments having changed the nature or consequences of the treatment.

This section also applies to surrogate committees under Sections 4720-4726. Thus, under subdivision (d), the action (or nonaction) of a surrogate committee may be reviewed by the court. For the decisionmaking standards applicable to surrogate committees, see Section 4723. See also Section 4725 (general surrogate rules applicable to surrogate committee).

An advance health care directive may limit the authority to petition under this part. See Sections 4752 (effect of provision in advance directive attempting to limit right to petition), 4753 (limitations on right to petition).

See also Sections 4605 (“advance health care directive” defined), 4607 (“agent” defined), 4609 (“capacity” defined), 4613 (“conservator” defined), 4629 (“power of attorney for health care” defined), 4633 (“principal” defined), 4643 (“surrogate” defined).

§ 4767. Commencement of proceeding

4767. A proceeding under this part is commenced by filing a petition stating facts showing that the petition is authorized under this part, the grounds of the petition, and, if known to the petitioner, the terms of any advance health care directive in question.

Comment. Section 4767 continues former Section 4943 to the extent it applied to powers of attorney for health care.

See also Section 4605 (“advance health care directive” defined).

§ 4768. Dismissal of petition

4768. The court may dismiss a petition if it appears that the proceeding is not reasonably necessary for the protection of the interests of the patient and shall stay or dismiss the proceeding in whole or in part when required by Section 410.30 of the Code of Civil Procedure.

Comment. Section 4768 is similar to Section 4944 in the Power of Attorney Law. Under this section, the court has authority to stay or dismiss a proceeding in this state if, in the interest of substantial justice, the proceeding should be heard in a forum outside this state. See Code Civ. Proc. § 410.30.

See also Section 4625 (“patient” defined).

§ 4769. Notice of hearing

4769. (a) Subject to subdivision (b), at least 15 days before the time set for hearing, the petitioner shall serve notice of the time and place of the hearing, together with a copy of the petition, on the following:

- (1) The agent or surrogate, if not the petitioner.

(2) The patient, if not the petitioner.

(b) In the case of a petition to compel a third person to honor the authority of an agent or surrogate, notice of the time and place of the hearing, together with a copy of the petition, shall be served on the third person in the manner provided in Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure.

Comment. Section 4769 continues former Section 4945 to the extent it applied to powers of attorney for health care and extends its principles to apply to surrogates. Subdivision (b) is generalized from former Section 4945(b) applicable to property powers of attorney.

See also Sections 4607 (“agent” defined), 4625 (“patient” defined), 4633 (“principal” defined), 4643 (“surrogate” defined).

§ 4770. Temporary health care order

4770. The court in its discretion, on a showing of good cause, may issue a temporary order prescribing the health care of the patient until the disposition of the petition filed under Section 4766. If a power of attorney for health care is in effect and a conservator (including a temporary conservator) of the person is appointed for the principal, the court that appoints the conservator in its discretion, on a showing of good cause, may issue a temporary order prescribing the health care of the principal, the order to continue in effect for the period ordered by the court but in no case longer than the period necessary to permit the filing and determination of a petition filed under Section 4766.

Comment. Section 4770 continues former Section 4946 to the extent it applied to powers of attorney for health care. This section is intended to make clear that the court has authority to provide, for example, for the continuance of treatment necessary to keep the patient alive pending the court’s action on the petition. See also Section 1046 (court authority to make appropriate orders).

See also Sections 4605 (“advance health care directive” defined), 4613 (“conservator” defined), 4615 (“health care” defined), 4625 (“patient” defined), 4633 (“principal” defined).

§ 4771. Award of attorney's fees

4771. In a proceeding under this part commenced by the filing of a petition by a person other than the agent or surrogate, the court may in its discretion award reasonable attorney's fees to one of the following:

(a) The agent or surrogate, if the court determines that the proceeding was commenced without any reasonable cause.

(b) The person commencing the proceeding, if the court determines that the agent or surrogate has clearly violated the duties under the advance health care directive.

Comment. Section 4771 continues part of former Section 4947 to the extent it applied to powers of attorney for health care.

See also Sections 4605 ("advance health care directive" defined), 4607 ("agent" defined), 4633 ("principal" defined), 4643 ("surrogate" defined).

PART 4. REQUEST TO FORGO RESUSCITATIVE MEASURES

§ 4780. Request to forgo resuscitative measures

4780. (a) As used in this part:

(1) "Request to forgo resuscitative measures" means a written document, signed by (A) an individual, or a legally recognized surrogate health care decisionmaker, and (B) a physician, that directs a health care provider to forgo resuscitative measures for the individual.

(2) "Request to forgo resuscitative measures" includes a prehospital "do not resuscitate" form as developed by the Emergency Medical Services Authority or other substantially similar form.

(b) A request to forgo resuscitative measures may also be evidenced by a medallion engraved with the words "do not resuscitate" or the letters "DNR," a patient identification number, and a 24-hour toll-free telephone number, issued by

a person pursuant to an agreement with the Emergency Medical Services Authority.

Comment. Section 4780 continues former Section 4753(b) without substantive change. The phrase “for the individual” has been added at the end of subdivision (a)(1) for clarity. The former reference to “physician and surgeon” has been changed to “physician” for clarity. See Section 4627 (“physician” defined). For rules governing “legally recognized surrogate health care decisionmakers,” see Part 2 (commencing with Section 4670) (Uniform Health Care Decisions Act).

See also Section 4781 (“health care provider” defined), 4625 (“patient” defined).

§ 4781. Health care provider

4781. As used in this part, “health care provider” includes, but is not limited to, the following:

(a) Persons described in Section 4621.

(b) Emergency response employees, including, but not limited to, firefighters, law enforcement officers, emergency medical technicians I and II, paramedics, and employees and volunteer members of legally organized and recognized volunteer organizations, who are trained in accordance with standards adopted as regulations by the Emergency Medical Services Authority pursuant to Sections 1797.170, 1797.171, 1797.172, 1797.182, and 1797.183 of the Health and Safety Code to respond to medical emergencies in the course of performing their volunteer or employee duties with the organization.

Comment. Section 4781 continues former Section 4753(g) without substantive change.

§ 4782. Immunity for honoring request to forgo resuscitative measures

4782. A health care provider who honors a request to forgo resuscitative measures is not subject to criminal prosecution, civil liability, discipline for unprofessional conduct, administrative sanction, or any other sanction, as a result of his or her reliance on the request, if the health care provider

(a) believes in good faith that the action or decision is consistent with this part, and (b) has no knowledge that the action or decision would be inconsistent with a health care decision that the individual signing the request would have made on his or her own behalf under like circumstances.

Comment. Section 4782 continues former Section 4753(a) without substantive change.

See also Sections 4617 (“health care decision” defined), 4780 (“request to forgo resuscitative measures” defined), 4781 (“health care provider” defined).

§ 4783. Forms for requests to forgo resuscitative measures

4783. (a) Forms for requests to forgo resuscitative measures printed after January 1, 1995, shall contain the following:

“By signing this form, the surrogate acknowledges that this request to forgo resuscitative measures is consistent with the known desires of, and with the best interest of, the individual who is the subject of the form.”

(b) A substantially similar printed form is valid and enforceable if all of the following conditions are met:

(1) The form is signed by the individual, or the individual’s legally recognized surrogate health care decisionmaker, and a physician.

(2) The form directs health care providers to forgo resuscitative measures.

(3) The form contains all other information required by this section.

Comment. Section 4783 continues former Section 4753(c)-(d) without substantive change. For rules governing “legally recognized surrogate health care decisionmakers,” see Part 2 (commencing with Section 4670) (Uniform Health Care Decisions Act).

See also Sections 4627 (“physician” defined), 4780 (“request to forgo resuscitative measures” defined), 4781 (“health care provider” defined).

§ 4784. Presumption of validity

4784. In the absence of knowledge to the contrary, a health care provider may presume that a request to forgo resuscitative measures is valid and unrevoked.

Comment. Section 4784 continues former Section 4753(e) without change.

See also Sections 4780 (“request to forgo resuscitative measures” defined), 4781 (“health care provider” defined).

§ 4785. Application of part

4785. This part applies regardless of whether the individual executing a request to forgo resuscitative measures is within or outside a hospital or other health care institution.

Comment. Section 4785 continues former Section 4753(f) without substantive change.

See also Section 4619 (“health care institution” defined), 4780 (“request to forgo resuscitative measures” defined).

§ 4786. Relation to other law

4786. This part does not repeal or narrow laws relating to health care decisionmaking.

Comment. Section 4786 restates former Section 4753(h) without substantive change. The references to the Durable Power of Attorney for Health Care and the Natural Death Act have been omitted as unnecessary. The reference to “current” laws had been eliminated as obsolete.

PAR T 5 . ADVANC E HE AL TH C ARE DIRECTIVE REGISTRY

§ 4800. Registry system established by Secretary of State

4800. (a) The Secretary of State shall establish a registry system through which a person who has executed a written advance health care directive may register in a central information center, information regarding the advance directive, making that information available upon request to

any health care provider, the public guardian, or other person authorized by the registrant.

(b) Information that may be received and released is limited to the registrant's name, social security or driver's license or other individual identifying number established by law, if any, address, date and place of birth, the intended place of deposit or safekeeping of the written advance health care directive, and the name and telephone number of the agent and any alternative agent.

(c) The Secretary of State, at the request of the registrant, may transmit the information received regarding the written advance health care directive to the registry system of another jurisdiction as identified by the registrant.

(d) The Secretary of State may charge a fee to each registrant in an amount such that, when all fees charged to registrants are aggregated, the aggregated fees do not exceed the actual cost of establishing and maintaining the registry.

Comment. Section 4800 continues former Section 4800 without substantive change as applied to powers of attorney for health care, and generalizes the former provision to apply to all written advance health care directives. Hence, in addition to powers of attorney for health care, this section as revised permits registration of individual health care instructions.

See Section 4605 ("advance health care directive" defined), 4607 ("agent" defined), 4621 ("health care provider" defined).

§ 4801. Identity and fees

4801. The Secretary of State shall establish procedures to verify the identities of health care providers, the public guardian, and other authorized persons requesting information pursuant to Section 4800. No fee shall be charged to any health care provider, the public guardian, or other authorized person requesting information pursuant to Section 4800.

Comment. Section 4801 continues former Section 4801 without change.

See also Section 4621 ("health care provider" defined).

§ 4802. Notice

4802. The Secretary of State shall establish procedures to advise each registrant of the following:

(a) A health care provider may not honor a written advance health care directive until it receives a copy from the registrant.

(b) Each registrant must notify the registry upon revocation of the advance directive.

(c) Each registrant must reregister upon execution of a subsequent advance directive.

Comment. Section 4802 continues former Section 4802 without substantive change as applied to powers of attorney for health care, and generalizes it to apply to all written advance health care directives. Hence, in addition to powers of attorney for health care, this section as revised permits registration of individual health care instructions.

See also Section 4605 (“advance health care directive” defined), 4621 (“health care provider” defined).

§ 4803. Effect of failure to register

4803. Failure to register with the Secretary of State does not affect the validity of any advance health care directive.

Comment. Section 4803 continues former Section 4804 without substantive change as applied to powers of attorney for health care, and generalizes it to apply to all written advance health care directives instead of the more limited class of durable powers of attorney for health care.

See also Section 4605 (“advance health care directive” defined).

§ 4804. Effect of registration on revocation and validity

4804. Registration with the Secretary of State does not affect the ability of the registrant to revoke the registrant’s advance health care directive or a later executed advance directive, nor does registration raise any presumption of validity or superiority among any competing advance directives or revocations.

Comment. Section 4804 continues former Section 4805 without substantive change as applied to powers of attorney for health care, and

generalizes it to apply to all written advance health care directives. Hence, in addition to powers of attorney for health care, this section as revised permits registration of individual health care instructions.

See also Section 4605 (“advance health care directive” defined).

§ 4805. Effect on health care provider

4805. Nothing in this chapter shall be construed to require a health care provider to request from the registry information about whether a patient has executed an advance health care directive. Nothing in this chapter shall be construed to affect the duty of a health care provider to provide information to a patient regarding advance health care directives pursuant to any provision of federal law.

Comment. Section 4805 continues former Section 4806 without substantive change as applied to powers of attorney for health care, and generalizes it to apply to all written advance health care directives. Hence, in addition to powers of attorney for health care, this section as revised permits registration of individual health care instructions.

See also Section 4605 (“advance health care directive” defined), 4621 (“health care provider” defined), 4625 (“patient” defined).

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CONFORMING REVISIONS AND REPEALS

GOVERNMENT CODE

Gov't Code § 8205 (technical amendment). Duties of notary public

SEC. _____. Section 8205 of the Government Code is amended to read:

8205. (a) It is the duty of a notary public, when requested:

(1) To demand acceptance and payment of foreign and inland bills of exchange, or promissory notes, to protest them for nonacceptance and nonpayment, and, with regard only to the nonacceptance or nonpayment of bills and notes, to exercise any other powers and duties that by the law of nations and according to commercial usages, or by the laws of any other state, government, or country, may be performed by notaries.

(2) To take the acknowledgment or proof of *advance health care directives*, powers of attorney, mortgages, deeds, grants, transfers, and other instruments of writing executed by any person, and to give a certificate of that proof or acknowledgment, endorsed on or attached to the instrument. The certificate shall be signed by the notary public in the notary public's own handwriting. A notary public may not accept any acknowledgment or proof of any instrument that is incomplete.

(3) To take depositions and affidavits, and administer oaths and affirmations, in all matters incident to the duties of the office, or to be used before any court, judge, officer, or board. Any deposition, affidavit, oath, or affirmation shall be signed by the notary public in the notary public's own handwriting.

(4) To certify copies of powers of attorney under Section 4307 of the Probate Code. The certification shall be signed by the notary public in the notary public's own handwriting.

(b) It shall further be the duty of a notary public, upon written request:

(1) To furnish to the Secretary of State certified copies of the notary's journal.

(2) To respond within 30 days of receiving written requests sent by certified mail from the Secretary of State's office for information relating to official acts performed by the notary.

Comment. Subdivision (a)(2) of Section 8205 is amended to recognize that advance health care directives are treated separately by statute from powers of attorney. See Prob. Code § 4600 *et seq.* (Health Care Decisions Law); 4673 (witnessing or notarization of advance health care directive executed in skilled nursing facility).

HEALTH AND SAFETY CODE

Health & Safety Code § 1418.8 (repealed). Consent for incapacitated patient in skilled nursing facility or intermediate care facility

SEC. _____. Section 1418.8 of the Health and Safety Code is repealed.

~~1418.8. (a) If the attending physician and surgeon of a resident in a skilled nursing facility or intermediate care facility prescribes or orders a medical intervention that requires informed consent be obtained prior to administration of the medical intervention, but is unable to obtain informed consent because the physician and surgeon determines that the resident lacks capacity to make decisions concerning his or her health care and that there is no person with legal authority to make those decisions on behalf of the resident, the physician and surgeon shall inform the skilled nursing facility or intermediate care facility.~~

~~(b) For purposes of subdivision (a), a resident lacks capacity to make a decision regarding his or her health care if the resident is unable to understand the nature and consequences of the proposed medical intervention, including its risks and benefits, or is unable to express a preference regarding the intervention. To make the determination regarding capacity,~~

~~the physician shall interview the patient, review the patient's medical records, and consult with skilled nursing or intermediate care facility staff, as appropriate, and family members and friends of the resident, if any have been identified.~~

~~(c) For purposes of subdivision (a), a person with legal authority to make medical treatment decisions on behalf of a patient is a person designated under a valid Durable Power of Attorney for Health Care, a guardian, a conservator, or next of kin. To determine the existence of a person with legal authority, the physician shall interview the patient, review the medical records of the patient and consult with skilled nursing or intermediate care facility staff, as appropriate, and family members and friends of the resident, if any have been identified.~~

~~(d) The attending physician and the skilled nursing facility or intermediate care facility may initiate a medical intervention that requires informed consent pursuant to subdivision (e) in accordance with acceptable standards of practice.~~

~~(e) Where a resident of a skilled nursing facility or intermediate care facility has been prescribed a medical intervention by a physician and surgeon that requires informed consent and the physician has determined that the resident lacks capacity to make health care decisions and there is no person with legal authority to make those decisions on behalf of the resident, the facility shall, except as provided in subdivision (h), conduct an interdisciplinary team review of the prescribed medical intervention prior to the administration of the medical intervention. The interdisciplinary team shall oversee the care of the resident utilizing a team approach to assessment and care planning and shall include the resident's attending physician, a registered professional nurse with responsibility for the resident, other~~

appropriate staff in disciplines as determined by the resident's needs, and, where practicable, a patient representative, in accordance with applicable federal and state requirements. The review shall include all of the following:

(1) A review of the physician's assessment of the resident's condition.

(2) The reason for the proposed use of the medical intervention.

(3) A discussion of the desires of the patient, where known. To determine the desires of the resident, the interdisciplinary team shall interview the patient, review the patient's medical records and consult with family members or friends, if any have been identified.

(4) The type of medical intervention to be used in the resident's care, including its probable frequency and duration.

(5) The probable impact on the resident's condition, with and without the use of the medical intervention.

(6) Reasonable alternative medical interventions considered or utilized and reasons for their discontinuance or inappropriateness.

(f) A patient representative may include a family member or friend of the resident who is unable to take full responsibility for the health care decisions of the resident, but has agreed to serve on the interdisciplinary team, or other person authorized by state or federal law.

(g) The interdisciplinary team shall periodically evaluate the use of the prescribed medical intervention at least quarterly or upon a significant change in the resident's medical condition.

(h) In case of an emergency, after obtaining a physician and surgeon's order as necessary, a skilled nursing or intermediate care facility may administer a medical intervention which requires informed consent prior to the facility convening an interdisciplinary team review. If the emergency results in the application of physical or chemical restraints, the

~~interdisciplinary team shall meet within one week of the emergency for an evaluation of the medical intervention.~~

~~(i) Physician and surgeons and skilled nursing facilities and intermediate care facilities shall not be required to obtain a court order pursuant to Section 3201 of the Probate Code prior to administering a medical intervention which requires informed consent if the requirements of this section are met.~~

~~(j) Nothing in this section shall in any way affect the right of a resident of a skilled nursing facility or intermediate care facility for whom medical intervention has been prescribed, ordered, or administered pursuant to this section to seek appropriate judicial relief to review the decision to provide the medical intervention.~~

~~(k) No physician or other health care provider, whose action under this section is in accordance with reasonable medical standards, is subject to administrative sanction if the physician or health care provider believes in good faith that the action is consistent with this section and the desires of the resident, or if unknown, the best interests of the resident.~~

~~(l) The determinations required to be made pursuant to subdivisions (a), (e), and (g), and the basis for those determinations shall be documented in the patient's medical record and shall be made available to the patient's representative for review.~~

Comment. Former Section 1418.8 is superseded by the procedure for making health care decisions for patients without surrogates provided by Probate Code Sections 4720-4725. The new procedure is not limited to incapacitated persons in skilled nursing facilities or intermediate care facilities. Parts of the new procedure were drawn from this section. See Prob. Code §§ 4720-4725 Comments. The terminology varies, however. For example, the term "medical intervention" is superseded by "health care decision" as defined in Probate Code Section 4617.

The conditions for using the procedure in subdivision (a) are continued in substance by Probate Code Section 4720 (application of surrogate committee chapter). Provisions relating to capacity and capacity determinations in subdivision (b) are superseded by Probate Code

Sections 4609 (“capacity” defined), 4657 (presumption of capacity), and 4658 (determination of capacity and other medical conditions).

Subdivision (c) is superseded by Probate Code Section 4720 (application of surrogate committee chapter). See also Prob. Code § 4712 (selection of statutory surrogate).

Subdivision (d) is superseded by Probate Code Section 4721 (referral to surrogate committee by primary physician). See also Prob. Code § 4654 (compliance with generally accepted health care standards).

The first sentence of subdivision (e) is superseded by Probate Code Sections 4720 (conditions for application of chapter) and 4721 (referral to surrogate committee). The interdisciplinary team is superseded by a surrogate committee. As to emergency care, see Prob. Code § 4651(b)(2). The second sentence is superseded by Probate Code Sections 4722 (composition of surrogate committee) and 4724 (decisionmaking by surrogate committee). The standards of review in the third sentence are continued and generalized in Probate Code Section 4723(a).

The part of subdivision (f) relating to family and friends is continued and generalized in Probate Code Section 4722(b)(3) (composition of surrogate committee). The reference to persons authorized by state or federal law is omitted as surplus, but such persons would be permissible under Probate Code Section 4722, which provides some flexibility in composition of the surrogate committee.

Subdivision (g) is generalized in revised form in Probate Code Section 4723(b) (periodic review).

Subdivision (h) is continued and generalized in Probate Code Section 4726 (review of emergency care).

Subdivision (i) is superseded by Probate Code Section 4750(d) (judicial intervention disfavored), which continues the same policy.

Subdivision (j) is superseded by Probate Code Section 4765 (permissible petitioners).

The first part of subdivision (k) is superseded by Probate Code Section 4740 (immunities of health care provider and institution). The last part is superseded by Probate Code Sections 4714 (standard governing surrogate’s health care decisions), 4723(a)(3) (standards of review by surrogate committee), and 4725 (general surrogate rules applicable to surrogate committee).

Subdivision (l) is superseded by Probate Code Sections 4676 (right to health care information) and 4732 (duty of primary physician to record relevant information).

Health & Safety Code § 1569.156 (amended). Information and education on advance directives in residential care facility

SEC. _____. Section 1569.156 of the Health and Safety Code is amended to read:

1569.156. (a) A residential care facility for the elderly shall do all of the following:

(1) Not condition the provision of care or otherwise discriminate based on whether or not an individual has executed an advance directive, consistent with applicable laws and regulations.

(2) Provide education to staff on issues concerning advance directives.

(3) Provide written information, upon admission, about the right to make decisions concerning medical care, including the right to accept or refuse medical or surgical treatment and the right, under state law, to formulate advance directives.

(4) Provide written information about policies of the facility regarding the implementation of the rights described in paragraph (3).

(b) For purposes of this section, “advance directive” means ~~instructions relating to the provision of health care when individuals are unable to communicate their wishes regarding medical treatment. The “advance directive” may be a written document authorizing an agent or surrogate to make decisions on an individual’s behalf, including a durable power of attorney for health care, as defined in Section 4700 of the Probate Code, a written statement such as a declaration, as defined in Section 7186.5, an “advance health care directive,” as defined in Section 4605 of the Probate Code, or some other form of instruction recognized under state law specifically addressing the provision of health care.~~

Comment. Subdivision (b) of Section 1569.156 is amended for conformity with the Health Care Decisions Law, Probate Code Section 4600 *et seq.* “Advance health care directives” under Probate Code Section 4605 is a broad term that includes powers of attorney for health

care (defined in Probate Code Section 4629) and individual health care instructions (defined in Probate Code Section 4623). The reference to “some other form” at the end of subdivision (b) is retained out of an abundance of caution. All recognized forms of advance health care directives for adults who lack decisionmaking capacity are intended to be encompassed by the Health Care Decisions Law. See, e.g., Prob. Code §§ 4651 (scope of law), 4665 (application to existing advance directives). Specifically, declarations under former Section 7186.5 of the Natural Death Act are governed by the new law and are included in the term “advance health care directive.” See former Health & Safety Code §§ 7185 & 7186.5 Comments; Prob. Code §§ 4623 & Comment, 4665.

Health & Safety Code § 1584 (amended). Secured perimeter in adult day health care center

SEC. _____. Section 1584 of the Health and Safety Code is amended to read:

1584. (a) An adult day health care center that provides care for adults with Alzheimer’s disease and other dementias may install for the safety and security of those persons secured perimeter fences or egress control devices of the time-delay type on exit doors.

(b) As used in this section, “egress control device” means a device that precludes the use of exits for a predetermined period of time. These devices shall not delay any participant’s departure from the center for longer than 30 seconds. Center staff may attempt to redirect a participant who attempts to leave the center.

(c) Adult day health care centers installing security devices pursuant to this section shall meet all of the following requirements:

(1) The center shall be subject to all fire and building codes, regulations, and standards applicable to adult day health care centers using egress control devices or secured perimeter fences and shall receive a fire clearance from the fire authority having jurisdiction for the egress control devices or secured perimeter fences.

(2) The center shall maintain documentation of diagnosis by a physician of a participant's Alzheimer's disease or other dementia.

(3) The center shall provide staff training regarding the use and operation of the egress control devices utilized by the center, the protection of participants' personal rights, wandering behavior and acceptable methods of redirection, and emergency evacuation procedures for persons with dementia.

(4) All admissions to the center shall continue to be voluntary on the part of the participant or with consent of the participant's conservator, an agent of the ~~participant's with a durable~~ *participant under a power of attorney health care*, or other person who has the authority to act on behalf of the participant. Persons who have the authority to act on behalf of the participant include the participant's spouse or closest available relative.

(5) The center shall inform all participants, conservators, agents, and persons who have the authority to act on behalf of participants of the use of security devices. The center shall maintain a signed participation agreement indicating the use of the devices and the consent of the participant, conservator, agent, or person who has the authority to act on behalf of the participant. The center shall retain the original statement in the participant's files at the center.

(6) The use of egress control devices or secured perimeter fences shall not substitute for adequate staff. Staffing ratios shall at all times meet the requirements of applicable regulations.

(7) Emergency fire and earthquake drills shall be conducted at least once every three months, or more frequently as required by a county or city fire department or local fire prevention district. The drills shall include all center staff and volunteers providing participant care and supervision. This

requirement does not preclude drills with participants as required by regulations.

(8) The center shall develop a plan of operation approved by the department that includes a description of how the center is to be equipped with egress control devices or secured perimeter fences that are consistent with regulations adopted by the State Fire Marshal pursuant to Section 13143. The plan shall include, but not be limited to, the following:

(A) A description of how the center will provide training for staff regarding the use and operation of the egress control device utilized by the center.

(B) A description of how the center will ensure the protection of the participant's personal rights consistent with applicable regulations.

(C) A description of the center's emergency evacuation procedures for persons with Alzheimer's disease and other dementias.

(d) This section does not require an adult day health care center to use security devices in providing care for persons with Alzheimer's disease and other dementias.

Comment. Subdivision (c)(4) of Section 1584 is amended to reflect the replacement of the durable power of attorney for health care under the Power of Attorney Law with advance health care directives under the Health Care Decisions Law. See Prob. Code § 4600 *et seq.*

Health & Safety Code § 1599.73 (amended). Statement of patients' right to confidential treatment

SEC. _____. Section 1599.73 of the Health and Safety Code is amended to read:

1599.73. (a) Every contract of admission shall state that residents have a right to confidential treatment of medical information.

(b) The contract shall provide a means by which the resident may authorize the disclosure of information to specific persons, by attachment of a separate sheet that

conforms to the specifications of Section 56 of the Civil Code. After admission, the facility shall encourage competent residents *having capacity to make health care decisions* to execute a ~~durable power of attorney for health care~~ *an advance health care directive* in the event that he or she becomes unable to give consent for disclosure. The facility shall make available upon request to the long-term care ombudsman a list of newly admitted patients.

Comment. Section 1599.73 is amended to reflect the replacement of the durable power of attorney for health care under the Power of Attorney Law with advance health care directives under the Health Care Decisions Law. See Prob. Code § 4600 *et seq.*

Health & Safety Code § 7100 (amended). Right to control disposition of remains

SEC. _____. Section 7100 of the Health and Safety Code is amended to read:

7100. (a) The right to control the disposition of the remains of a deceased person, the location and conditions of interment, and arrangements for funeral goods and services to be provided, unless other directions have been given by the decedent pursuant to Section 7100.1, vests in, and the duty of disposition and the liability for the reasonable cost of disposition of the remains devolves upon, the following in the order named:

(1) An ~~attorney-in-fact~~ *agent* under a ~~durable~~ power of attorney for health care ~~executed pursuant to Chapter 1 governed by Division 4.7~~ (commencing with Section 4600) of ~~Part 4 of Division 4.5~~ of the Probate Code.

(2) The surviving spouse.

(3) The sole surviving adult child of the decedent, or if there is more than one adult child of the decedent, one-half or more of the surviving adult children. However, less than one-half of the surviving adult children shall be vested with the rights and duties of this section if they have used reasonable efforts to

notify all other surviving adult children of their instructions and are not aware of any opposition to those instructions on the part of more than one-half of all surviving adult children. For purposes of this section, “adult child” means a competent natural or adopted child of the decedent who has attained 18 years of age.

(4) The surviving parent or parents of the decedent. If one of the surviving parents is absent, the remaining parent shall be vested with the rights and duties of this section after reasonable efforts have been unsuccessful in locating the absent surviving parent.

(5) The surviving competent adult person or persons respectively in the next degrees of kindred. If there is more than one surviving person of the same degree of kindred, the majority of those persons. Less than the majority of surviving persons of the same degree of kindred shall be vested with the rights and duties of this section if those persons have used reasonable efforts to notify all other surviving persons of the same degree of kindred of their instructions and are not aware of any opposition to those instructions on the part of one-half or more of all surviving persons of the same degree of kindred.

(6) The public administrator when the deceased has sufficient assets.

(b)(1) If any person to whom the right of control has vested pursuant to subdivision (a) has been charged with first or second degree murder or voluntary manslaughter in connection with the decedent’s death and those charges are known to the funeral director or cemetery authority, the right of control is relinquished and passed on to the next of kin in accordance with subdivision (a).

(2) If the charges against the person are dropped, or if the person is acquitted of the charges, the right of control is returned to the person.

(3) Notwithstanding this subdivision, no person who has been charged with first or second degree murder or voluntary manslaughter in connection with the decedent's death to whom the right of control has not been returned pursuant to paragraph (2) shall have any right to control disposition pursuant to subdivision (a) which shall be applied, to the extent the funeral director or cemetery authority know about the charges, as if that person did not exist.

(c) A funeral director or cemetery authority shall have complete authority to control the disposition of the remains, and to proceed under this chapter to recover usual and customary charges for the disposition, when both of the following apply:

(1) Either of the following applies:

(A) The funeral director or cemetery authority has knowledge that none of the persons described in paragraphs (1) to (6), inclusive, of subdivision (a) exists.

(B) None of the persons described in paragraphs (1) to (6), inclusive, of subdivision (a) can be found after reasonable inquiry, or contacted by reasonable means.

(2) The public administrator fails to assume responsibility for disposition of the remains within seven days after having been given written notice of the facts. Written notice may be delivered by hand, U.S. mail, facsimile transmission, or telegraph.

(d) The liability for the reasonable cost of final disposition devolves jointly and severally upon all kin of the decedent in the same degree of kindred and upon the estate of the decedent. However, if a person accepts the gift of an entire body under subdivision (a) of Section 7155.5, that person, subject to the terms of the gift, shall be liable for the reasonable cost of final disposition of the decedent.

(e) This section shall be administered and construed to the end that the expressed instructions of the decedent or the

person entitled to control the disposition shall be faithfully and promptly performed.

(f) A funeral director or cemetery authority shall not be liable to any person or persons for carrying out the instructions of the decedent or the person entitled to control the disposition.

(g) For purposes of paragraph (5) of subdivision (a), “competent adult” means an adult who has not been declared incompetent by a court of law or who has been declared competent by a court of law following a declaration of incompetence.

Comment. Subdivision (a)(1) of Section 7100 is amended to refer to the Health Care Decisions Law, which supersedes the former provisions governing durable powers of attorney for health care, and to conform language to the usage in the new law. The reference to “execution” of a power of attorney “pursuant to” the California statute has been replaced by a reference to the law “governing” powers of attorney. This revision makes the scope of the authority granted by this section consistent with the general rules concerning recognition of powers of attorney for health care executed in other jurisdictions. See Prob. Code §§ 4605 (“advance health care directive” defined), 4674 (validity of written advance directive executed in another jurisdiction).

Health & Safety Code § 7151 (amended). Who may make or revoke anatomical gift

SEC. _____. Section 7151 of the Health and Safety Code is amended to read:

7151. (a) Except as provided in Section 7152, any member of the following classes of persons, in the order of priority listed, may make an anatomical gift of all or part of the decedent’s body or a pacemaker for an authorized purpose, unless the decedent, at the time of death, has made an unrevoked refusal to make that anatomical gift:

(1) The ~~attorney-in-fact~~ *agent* under a ~~valid durable~~ power of attorney *for health care* that expressly authorizes *or does not limit the authority of the* ~~attorney-in-fact~~ *agent* to make an

anatomical gift of all or part of the principal's body or a pacemaker.

(2) The spouse of the decedent.

(3) An adult son or daughter of the decedent.

(4) Either parent of the decedent.

(5) An adult brother or sister of the decedent.

(6) A grandparent of the decedent.

(7) A guardian or conservator of the person of the decedent at the time of death.

(b) An anatomical gift may not be made by a person listed in subdivision (a) if any of the following occur:

(1) A person in a prior class is available at the time of death to make an anatomical gift.

(2) The person proposing to make an anatomical gift knows of a refusal or contrary indications by the decedent.

(3) The person proposing to make an anatomical gift knows of an objection to making an anatomical gift by a member of the person's class or a prior class.

(c) An anatomical gift by a person authorized under subdivision (a) shall be made by a document of gift signed by the person or the person's telegraphic, recorded telephonic, or other recorded message, or other form of communication from the person that is contemporaneously reduced to writing and signed by the recipient.

(d) An anatomical gift by a person authorized under subdivision (a) may be revoked by any member of the same or a prior class if, before procedures have begun for the removal of a part from the body of the decedent, the physician, surgeon, technician, or enucleator removing the part knows of the revocation.

(e) A failure to make an anatomical gift under subdivision (a) is not an objection to the making of an anatomical gift.

Comment. Subdivision (a)(1) of Section 7151 is amended for consistency with the language and authority provided the agent under a power of attorney for health care. See Prob. Code §§ 4683 (scope of

agent's authority), 4701 (optional form of advance health care directive). This amendment resolves a conflict between this section and the broad presumptive authority granted the agent selected by the principal. Of course, the agent must comply with the wishes of the principal as provided in subdivision (b). See also Prob. Code § 4684 (standard governing agent's health care decisions).

Health & Safety Code §§ 7185-7194.5 (repealed). Natural Death Act

SEC. _____. Chapter 3.9 (commencing with Section 7185) of Part 1 of Division 7 of the Health and Safety Code is repealed.

§ 7185 (repealed). Short title

Comment. Former Section 7185 is not continued. The Natural Death Act is superseded by the provisions of Division 4.7 (commencing with Section 4600) of the Probate Code relating to advance health care directives. The new law is not limited to decisions concerning life-sustaining treatment of persons in a terminal or permanent unconscious condition.

§ 7185.5 (repealed). Legislative findings and declarations

Comment. The substance of subdivisions (a)-(e) of former Section 7185 is continued in Probate Code Section 4650 (legislative findings), except that the references to "terminal condition or permanent unconscious decision" have been omitted to reflect relevant case law and the scope of the Uniform Health Care Decisions Act (Prob. Code § 4670 *et seq.*). See also Section 4750 (judicial intervention disfavored).

Subdivision (f) is omitted as surplus. See former Section 7185 Comment.

§ 7186 (repealed). Definitions

Comment. Subdivision (a) of former Section 7186 is continued in Probate Code Section 4631 ("primary physician" defined) without substantive change. Subdivision (b) is superseded by Probate Code Section 4605 ("advance health care directive" defined). Subdivision (c) is continued in Probate Code Section 4621 ("health care provider" defined) without substantive change. Subdivisions (d) and (e) are not continued. See former Section 7185 Comment.

Subdivision (f) is unnecessary in view of Probate Code Section 56 ("person" defined). Subdivision (g) is continued in Probate Code Section 4627 ("physician" defined) without change. Subdivision (h) is

superseded by Probate Code Sections 4670 (who may give individual instruction). Subdivision (i) is unnecessary in view of Probate Code Section 74 (“state” defined). Subdivision (j) is not continued. See former Section 7185 Comment.

§ 7186.5 (repealed). Declaration governing life-sustaining treatment

Comment. The first sentence of former Section 7186.5(a) is superseded by Probate Code Section 4670 (who may give individual instruction). The second sentence concerning general witnessing requirements is not continued; an individual health care instruction is not generally required to be witnessed. The third sentence concerning special witnessing requirements in skilled nursing facilities is continued in Probate Code Section 4673 without substantive change.

The declaration form in subdivision (b) is superseded by the optional form of an advance health care directive in Probate Code Section 4701 and related substantive rules. For transitional provisions relating to declarations executed under the repealed Natural Death Act, see Prob. Code § 4665(a).

The substance of the record-keeping duty in subdivision (c) is continued in Probate Code Section 4731. The language concerning a health care provider who is unwilling to comply is superseded by Probate Code Sections 4734 (right to decline for reasons of conscience or institutional policy), 4735 (right to decline to provide ineffective care), and 4736 (duty of declining health care provider or institution).

§ 7187 (repealed). Skilled nursing facility or long-term health care facility

Comment. Former Section 7187 is continued in Probate Code Section 4673(c) without substantive change. See also Prob. Code Section 4639 (“skilled nursing facility” defined).

§ 7187.5 (repealed). When declaration becomes operative

Comment. The first sentence of former Section 7187.5 is not continued. See former Section 7185 Comment. As to the determination of preconditions to operation of the declaration (advance health care directive), see Probate Code Sections 4651(b)(1) (authority of individual with capacity not affected), 4657 (presumption of capacity), 4658 (determination of capacity and other conditions).

The duty to comply with the declaration in the second sentence is superseded by Probate Code Section 4733(a). The duty to transfer is superseded by Probate Code Section 4736 (duty of declining health care provider or institution).

§ 7188 (repealed). Revocation

Comment. Subdivision (a) of former Section 7188 is superseded by Probate Code Section 4695 (revocation of advance directive).

The duty to record the revocation provided in subdivision (b) is continued in Probate Code Section 4731(a) without substantive change.

§ 7189 (repealed). Determination of terminal or permanent unconscious condition

Comment. Former Section 7189 is superseded by Probate Code Sections 4658 (authority to determine capacity and other conditions) and 4732 (duty to record relevant information).

§ 7189.5 (repealed). Patient's right to make decisions concerning life-sustaining treatment

Comment. Subdivision (a) of former Section 7189.5 is replaced by Probate Code Section 4651(b)(1). See also Prob. Code §§ 4657 (presumption of capacity), 4695 (revocation of advance directive).

Subdivision (b) is replaced by the general rules in Probate Code Sections 4654 (compliance with generally accepted health care standards), 4733 (obligation to comply with reasonable interpretation of health care instructions and decisions). See also Prob. Code § 4736(b) (continuing care until transfer can be accomplished).

Subdivision (c) is not continued. But *cf.* Prob. Code § 4652(e) (Health Care Decisions Law does not authorize consent to abortion).

§ 7190 (repealed). Duties of health care provider unwilling to comply with chapter

Comment. Former Section 7190 is continued in Probate Code Section 4736 (duty of declining health care provider or institution) without substantive change.

§ 7190.5 (repealed). Liability and professional discipline

Comment. Former Section 7190.5 is superseded by Probate Code Section 4740 (immunities of health care provider and institution).

§ 7191 (repealed). Crimes

Comment. Subdivisions (a) and (b) of former Section 7191 are superseded by Probate Code Section 4742, which provides statutory damages instead of criminal penalties.

Subdivisions (c) and (d) are replaced by Probate Code Section 4743 (criminal penalties).

Subdivisions (e) and (f) are superseded by the prohibition in Probate Code Section 4675 (restriction on requiring or prohibiting advance directive).

The rule in subdivision (g) is continued in Probate Code Section 4742(c) (statutory damages cumulative with other remedies).

§ 7191.5 (repealed). Effect of death on life insurance or annuity

Comment. Subdivision (a) of former Section 7191.5 is generalized in Probate Code Section 4656 (effect on death benefits).

Subdivision (b) is replaced by Probate Code Section 4656.

Subdivision (c) is continued in Probate Code Section 4675 (restriction on requiring or prohibiting advance directive) without substantive change.

Subdivision (d) is continued and generalized in Probate Code Section 4655(a) (impermissible constructions).

Subdivision (e) is superseded by Probate Code Section 4651(b)(1) (authority not affected). See also Prob. Code § 4657 (presumption of capacity)

Subdivision (f) is continued in Probate Code Section 4654 (compliance with generally accepted health care standards) without substantive change.

Subdivision (g) is continued in Probate Code Section 4653 (mercy killing, assisted suicide, euthanasia not approved) without substantive change.

Subdivision (h) is superseded by Probate Code Sections 4651(b) (other authority not affected) and 4751 (cumulative remedies).

§ 7192 (repealed). Presumption of validity of declaration

Comment. Former Section 7192 is continued and generalized in Probate Code Section 4674(b) (validity of written advance directive executed in another jurisdiction).

§ 7192.5 (repealed). Validity of declarations executed in another state

Comment. Former Section 7192.5 is continued in Probate Code Section 4674(a) (validity of written advance directive executed in another jurisdiction) without substantive change.

§ 7193 (repealed). Effect of durable power of attorney for health care

Comment. Former Section 7193 is superseded by Probate Code Section 4698 (effect of later advance directive on earlier advance directive).

§ 7193.5 (repealed). Instruments to be given effect

Comment. Former Section 7193.5 is superseded by Probate Code Sections 4665 (application to existing advance directives), 4674 (validity of written advance directive executed in another jurisdiction). See also Prob. Code § 4605 (“advance health care directive” defined).

§ 7194 (repealed). Severability clause

Comment. Former Section 7194 is superseded by Probate Code Section 11 (severability).

§ 7194.5 (repealed). Conformity with Uniform Rights of the Terminally Ill Act

Comment. Former Section 7194.5 is superseded by Probate Code Section 2(b) (construction of provisions drawn from uniform acts).

Health & Safety Code § 24179.5. Application of chapter to withholding or withdrawal of life-sustaining procedures

SEC. _____. Section 24179.5 of the Health and Safety Code is amended to read:

24179.5. Notwithstanding any other provision of this chapter, this chapter shall *does* not apply to an adult person in a terminal condition who executes a directive directing the withholding or withdrawal of life-sustaining procedures pursuant to Section 7188. To the extent of any conflict, the provisions of Chapter 3.9 (commencing with Section 7185) of Part 1, of Division 7 shall prevail *Division 4.7 (commencing with Section 4600) of the Probate Code prevails* over the provisions of this chapter.

Comment. Section 24179.5 is amended to reflect the replacement of the Natural Death Act in former Section 7185 *et seq.* with the Health Care Decisions Law, Probate Code Section 4600 *et seq.*

PROBATE CODE

Prob. Code § 811 (amended). Deficits in mental functions

SEC. _____. Section 811 of the Probate Code is amended to read:

811. (a) A determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act, including, but not limited to, the incapacity to contract, to make a conveyance, to marry, to make medical decisions, to execute wills, or to execute trusts, shall be supported by evidence of a deficit in at least one of the following mental functions, subject to subdivision (b), and evidence of a correlation between the deficit or deficits and the decision or acts in question:

(1) Alertness and attention, including, but not limited to, the following:

(A) Level of arousal or consciousness.

(B) Orientation to time, place, person, and situation.

(C) Ability to attend and concentrate.

(2) Information processing, including, but not limited to, the following:

(A) Short- and long-term memory, including immediate recall.

(B) Ability to understand or communicate with others, either verbally or otherwise.

(C) Recognition of familiar objects and familiar persons.

(D) Ability to understand and appreciate quantities.

(E) Ability to reason using abstract concepts.

(F) Ability to plan, organize, and carry out actions in one's own rational self-interest.

(G) Ability to reason logically.

(3) Thought processes. Deficits in these functions may be demonstrated by the presence of the following:

(A) Severely disorganized thinking.

(B) Hallucinations.

(C) Delusions.

(D) Uncontrollable, repetitive, or intrusive thoughts.

(4) Ability to modulate mood and affect. Deficits in this ability may be demonstrated by the presence of a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, that is inappropriate in degree to the individual's circumstances.

(b) A deficit in the mental functions listed above may be considered only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.

(c) In determining whether a person suffers from a deficit in mental function so substantial that the person lacks the capacity to do a certain act, the court may take into consideration the frequency, severity, and duration of periods of impairment.

(d) The mere diagnosis of a mental or physical disorder shall not be sufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to do a certain act.

(e) This part applies only to the evidence that is presented to, and the findings that are made by, a court determining the capacity of a person to do a certain act or make a decision, including, but not limited to, making medical decisions. Nothing in this part ~~shall affect~~ *affects* the decisionmaking process set forth in ~~Section 1418.8 of the Health and Safety Code, nor provided in Chapter 4 (commencing with Section 4720) of Part 2 of Division 4.7.~~ *This part does not increase or decrease the burdens of documentation on, or potential liability of, health care providers who, outside the judicial*

context, determine the capacity of patients to make a medical decision.

Comment. Section 811 is amended to reflect the replacement of Health and Safety Code Section 1418.8 with Probate Code Sections 4720-4726 in the Uniform Health Care Decisions Act.

Prob. Code § 1302 (amended). Grounds for appeal under Power of Attorney Law

SEC. _____. Section 1302 of the Probate Code is amended to read:

1302. With respect to a power of attorney, ~~the grant or refusal to grant the following orders is appealable governed by the Power of Attorney Law (Division 4.5 (commencing with Section 4000))~~, an appeal may be taken from any of the following:

(a) Any final order under Section 4941 ~~4541~~, except an order pursuant to subdivision (c) of Section 4941 ~~4541~~.

(b) ~~Any final order under Section 4942, except an order pursuant to subdivision (c) of Section 4942.~~

(c) An order dismissing the petition or denying a motion to dismiss under Section 4944 ~~4543~~.

Comment. Section 1302 is amended to reflect the renumbering of former Sections 4900-4947 and to refer to powers of attorney governed by the Power of Attorney Law. Appeals relating to powers of attorney governed by the Health Care Decisions Law are governed by Section 1302.5. The introductory clause is also revised to correct erroneous language.

Prob. Code § 1302.5 (added). Grounds for appeal under Health Care Decisions Law

SEC. _____. Section 1302.5 is added to the Probate Code, to read:

1302.5. With respect to an advance health care directive governed by the Health Care Decisions Law (Division 4.7 (commencing with Section 4600)), an appeal may be taken from any of the following:

(a) Any final order under Section 4766.

(b) An order dismissing the petition or denying a motion to dismiss under Section 4768.

Comment. Section 1302.5 is added to reflect enactment of the Health Care Decisions Law (Section 4600 *et seq.*) and the removal of health care powers of attorney from the Power of Attorney Law (Section 4000 *et seq.*).

Prob. Code § 2105 (amended). Joint guardians or conservators

SEC. _____. Section 2105 of the Probate Code is amended to read:

2105. (a) The court, in its discretion, may appoint for a ward or conservatee:

(1) Two or more joint guardians or conservators of the person.

(2) Two or more joint guardians or conservators of the estate.

(3) Two or more joint guardians or conservators of the person and estate.

(b) When joint guardians or conservators are appointed, each shall qualify in the same manner as a sole guardian or conservator.

(c) Subject to subdivisions (d) and (e):

(1) Where there are two guardians or conservators, both must concur to exercise a power.

(2) Where there are more than two guardians or conservators, a majority must concur to exercise a power.

(d) If one of the joint guardians or conservators dies or is removed or resigns, the powers and duties continue in the remaining joint guardians or conservators until further appointment is made by the court.

(e) Where joint guardians or conservators have been appointed and one or more are (1) absent from the state and unable to act, (2) otherwise unable to act, or (3) legally disqualified from serving, the court may, by order made with

or without notice, authorize the remaining joint guardians or conservators to act as to all matters embraced within its order.

(f) If a custodial parent has been diagnosed as having a terminal condition, as evidenced by a declaration executed by a licensed physician, the court, in its discretion, may appoint the custodial parent and a person nominated by the custodial parent as joint guardians of the person of the minor. However, this appointment shall not be made over the objection of a noncustodial parent without a finding that the noncustodial parent's custody would be detrimental to the minor, as provided in Section 3041 of the Family Code. It is the intent of the Legislature in enacting the amendments to this subdivision adopted during the 1995-96 Regular Session for a parent with a terminal condition to be able to make arrangements for the joint care, custody, and control of his or her minor children so as to minimize the emotional stress of, and disruption for, the minor children whenever the parent is incapacitated or upon the parent's death, and to avoid the need to provide a temporary guardian or place the minor children in foster care, pending appointment of a guardian, as might otherwise be required.

"Terminal condition," for purposes of this subdivision, means an incurable and irreversible condition that, without the administration of life-sustaining treatment, will, within reasonable medical judgment, result in death.

~~Nothing in this section shall be construed to broaden or narrow the definition of the term "terminal condition," as defined in subdivision (j) of Section 7186 of the Health and Safety Code.~~

Comment. The last paragraph of Section 2105 is deleted because the definition to which it referred is repealed. See former Health & Safety Code § 7186 Comment.

Prob. Code § 2355 (amended). Health care where conservatee lacks capacity

SEC. _____. Section 2355 of the Probate Code is amended to read:

2355. (a) If the conservatee has been adjudicated to lack the capacity to ~~give informed consent for medical treatment~~ *make health care decisions*, the conservator has the exclusive authority to ~~give consent for such medical treatment to be performed on~~ *make health care decisions for the conservatee as that the conservator in good faith based on medical advice determines to be necessary and the. The conservator shall make health care decisions for the conservatee in accordance with the conservatee's individual health care instructions, if any, and other wishes to the extent known to the conservator. Otherwise, the conservator shall make the decision in accordance with the conservator's determination of the conservatee's best interest. In determining the conservatee's best interest, the conservator shall consider the conservatee's personal values to the extent known to the conservator. The conservator may require the conservatee to receive such medical treatment the health care*, whether or not the conservatee objects. In ~~any such~~ *this* case, the ~~consent~~ *health care decision* of the conservator alone is sufficient and no person is liable because the ~~medical treatment is performed upon~~ *health care is administered* to the conservatee without the conservatee's consent. *For the purposes of this subdivision, "health care" and "health care decision" have the meanings provided in Sections 4615 and 4617, respectively.*

(b) If prior to the establishment of the conservatorship the conservatee was an adherent of a religion whose tenets and practices call for reliance on prayer alone for healing, the treatment required by the conservator under the provisions of this section shall be by an accredited practitioner of that religion.

Comment. Subdivision (a) of Section 2105 is amended to add the second sentence providing a standard for making health care decisions. This standard is the same in substance as the standard applicable to other surrogate health care decisionmakers under the Health Care Decisions Law of Division 4.7 (commencing with Section 4600). See Sections 4684 (standard governing agent’s health care decisions under power of attorney for health care), 4714 (standard governing statutory surrogate’s health care decisions), 4725 (application of statutory surrogate rules to surrogate committee). Under this standard, the surrogate has both the right and fiduciary duty (“shall make health care decisions”) to make a decision based on the individual circumstances of the conservatee. As amended, subdivision (a) is consistent with *Conservatorship of Drabick*, 220 Cal. App. 3d 185, 245 Cal. Rptr. 840 (1988):

Incapacitated patients “retain the right to have appropriate medical decisions made on their behalf. An appropriate medical decision is one that is made in the patient’s best interests, as opposed to the interests of the hospital, the physicians, the legal system, or someone else. To summarize, California law gives persons a right to determine the scope of their own medical treatment, this right survives incompetence in the sense that incompetent patients retain the right to have appropriate decisions made on their behalf, and Probate Code section 2355 delegates to conservators the right and duty to make such decisions.

Id. at 205. Use of the terms “health care” and “health care decision” from the Health Care Decisions Law make clear that the scope of health care decisions that can be made by a conservator under this section is the same as provided in the Health Care Decisions Law.

The importance of the statutory language concerning the exclusive authority of the conservator and the duty this places on the conservator was also emphasized in *Drabick*:

The statute gives the conservator the exclusive authority to exercise the conservatee’s rights, and it is the conservator who must make the final treatment decision regardless of how much or how little information about the conservatee’s preferences is available. There is no necessity or authority for adopting a rule to the effect that the conservatee’s desire to have medical treatment withdrawn must be proved by clear and convincing evidence or another standard. Acknowledging that the patient’s expressed preferences are relevant, it is enough for the conservator, who must act in the conservatee’s best interests, to consider them in good faith.

Id. at 211-12. The intent of the rule in subdivision (a) is to protect and further the patient’s interest in making a health care decision in accordance with the patient’s expressed desires, where known, and if not, to make a decision in the patient’s best interest, taking personal values into account. The necessary determinations are to be made by the

conservator, whether private or public, in accordance with the statutory standard. Court control or intervention in this process is neither required by statute, nor desired by the courts. See, e.g., *Conservatorship of Morrison*, 206 Cal. App. 3d 304, 312, 253 Cal. Rptr. 530 (1988). *Drabick*, 200 Cal. App. 3d at 198-200. See also Sections 4650(d) (legislative findings), 4750 (judicial intervention disfavored).

This section does not specify any special evidentiary standard for the determination of the conservatee's wishes or best interest. Consequently, the general rule applies: the standard is by preponderance of the evidence. Proof is not required by clear and convincing evidence.

Prob. Code § 2356 (amended). Limitations on application of chapter

SEC. ____. Section 2356 of the Probate Code is amended to read:

2356. (a) No ward or conservatee may be placed in a mental health treatment facility under this division against the will of the ward or conservatee. Involuntary civil placement of a ward or conservatee in a mental health treatment facility may be obtained only pursuant to Chapter 2 (commencing with Section 5150) or Chapter 3 (commencing with Section 5350) of Part 1 of Division 5 of the Welfare and Institutions Code. Nothing in this subdivision precludes the placing of a ward in a state hospital under Section 6000 of the Welfare and Institutions Code upon application of the guardian as provided in that section. The Director of Mental Health shall adopt and issue regulations defining "mental health treatment facility" for the purposes of this subdivision.

(b) No experimental drug as defined in Section 111515 of the Health and Safety Code may be prescribed for or administered to a ward or conservatee under this division. Such an experimental drug may be prescribed for or administered to a ward or conservatee only as provided in Article 4 (commencing with Section 111515) of Chapter 6 of Part 5 of Division 104 of the Health and Safety Code.

(c) No convulsive treatment as defined in Section 5325 of the Welfare and Institutions Code may be performed on a

ward or conservatee under this division. Convulsive treatment may be performed on a ward or conservatee only as provided in Article 7 (commencing with Section 5325) of Chapter 2 of Part 1 of Division 5 of the Welfare and Institutions Code.

(d) No minor may be sterilized under this division.

(e) This chapter is subject to ~~any of the following instruments~~ if a valid and effective: *advance health care directive under the Health Care Decisions Law (Division 4.7 (commencing with Section 4600))*.

~~(1) A directive of the conservatee under Chapter 3.9 (commencing with Section 7185) of Part 1 of Division 7 of the Health and Safety Code (Natural Death Act).~~

~~(2) A power of attorney for health care, whether or not a durable power of attorney.~~

Comment. Subdivision (e) of Section 2356 is amended to refer to the provisions of the Health Care Decisions Law that replace the former Natural Death Act and the former durable power of attorney for health care provisions. This is a technical, nonsubstantive change that preserves the supremacy of the individual's advance directive over the rules concerning conservatorships.

Heading amended

SEC. _____. The heading of Part 7 (commencing with Section 3200) of Division 4 of the Probate Code is amended to read:

~~PART 7. AUTHORIZATION OF MEDICAL
TREATMENT CAPACITY DETERMINATIONS
AND HEALTH CARE DECISIONS FOR
ADULT WITHOUT CONSERVATOR~~

Comment. The part heading is amended to reflect the expanded scope of this part. See 1995 Cal. Stat. ch. 842, § 9 (adding determination of capacity to consent to specified medical treatment as independent ground for petition under Section 3201).

Revised 1990 Comment. This part supersedes Part 7 (commencing with Section 3200) of Division 4 of the repealed Probate Code. The superseded part was enacted on recommendation of the California Law Revision Commission. See *Recommendation Relating to Guardianship-Conservatorship Law*, 14 Cal. L. Revision Comm'n Reports 501 (1978). See also *Report of Assembly Committee on Judiciary on Assembly Bills Nos. 261 and 167*, republished in 15 Cal. L. Revision Comm'n Reports 1061, 1091 (1980). For the Guardianship-Conservatorship Law as enacted in 1979 (Chapter 726 of the Statutes of 1979) with the revisions made by Chapters 89 and 246 of the Statutes of 1980, see *Guardianship-Conservatorship Law*, 15 Cal. L. Revision Comm'n Reports 451 (1980).

The provisions of this part afford an alternative to establishing a conservatorship of the person where there is no ongoing need for a conservatorship. The procedural rules of this part provide an expeditious means of obtaining authorization for medical treatment while safeguarding basic rights of the patient: The patient has a right to counsel. Section 3205. The hearing is held after notice to the patient, the patient's attorney, and such other persons as the court orders. Section 3206. The court may determine the issue on medical declarations alone if the attorney for the petitioner and the attorney for the patient so stipulate. Section 3207. The court may not order medical treatment under this part if the patient has capacity to give informed consent to the treatment but refuses to do so. Section 3208.5.

Prob. Code § 3200 (amended). Definitions

SEC. _____. Section 3200 of the Probate Code is amended to read:

3200. As used in this part, "~~patient~~" part:

(a) "*Health care*" means any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a patient's physical or mental condition.

(b) "*Health care decision*" means a decision regarding the patient's health care, including the following:

(1) *Selection and discharge of health care providers and institutions.*

(2) *Approval or disapproval of diagnostic tests, surgical procedures, programs of medication.*

(3) *Directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation.*

(c) *“Health care institution” means an institution, facility, or agency licensed, certified, or otherwise authorized or permitted by law to provide health care in the ordinary course of business.*

(d) *“Patient” means an adult who does not have a conservator of the person and who is in need of medical treatment for whom a health care decision needs to be made.*

Comment. Section 3200 is amended to adopt definitions that are consistent with the Health Care Decisions Law. See Section 4500 *et seq.* The definition of “health care decision” in subdivision (b) makes clear, as used in other provisions in this part, that court-authorized health care decisions include end-of-life decisions. See Section 3208(c). This is consistent with the scope of the Health Care Decisions Law.

Prob. Code § 3201 (amended). Petition for court authorization

SEC. _____. Section 3201 of the Probate Code is amended to read:

3201. (a) A petition may be filed to determine that a patient has the capacity to ~~give informed consent to a specified medical treatment for~~ *make a health care decision concerning* an existing or continuing medical condition.

(b) A petition may be filed to determine that a patient lacks the capacity to ~~give informed consent to a~~ *make a health care decision concerning* specified medical treatment for an existing or continuing medical condition, and further for an order authorizing a designated person to ~~give consent to such treatment~~ *make a health care decision* on behalf of the patient.

(c) One proceeding may be brought under this part under both subdivisions (a) and (b).

~~(d) In determining whether a person’s mental functioning is so severely impaired that the person lacks the capacity to give informed consent to any form of medical treatment, the court~~

~~may take into consideration the frequency, severity and duration of periods of impairment.~~

~~(e) Nothing in this part shall supersede the right that any person may have under existing law to make medical decisions on behalf of a patient, or affect the decisionmaking process of a long-term health care facility, as defined in subdivision (b) of Section 1418.8 of the Health and Safety Code.~~

~~(f) This chapter is permissive and cumulative for the relief to which it applies.~~

~~(g) Nothing in this part shall be construed to supersede or impair the right of any individual to choose treatment by spiritual means in lieu of medical treatment, nor shall any person choosing treatment by spiritual means, in accordance with the tenets and practices of that individual's established religious tradition, be required to submit to medical testing of any kind pursuant to a determination of competency.~~

Comment. Subdivisions (a) and (b) of Section 3201 are amended to use the terminology of Section 3200 and make the language internally consistent. See Section 3200 Comment. Other technical, nonsubstantive changes are also made.

Subdivision (d) is continued in Section 3208(b) (order authorizing treatment) without substantive change. See Section 3208 Comment.

Subdivision (e) is continued in Section 3210(c) (supplemental, alternative procedure) without substantive change. Subdivision (f) is continued in Section 3210(a) without substantive change. See Section 3210 Comment.

Subdivision (g) is continued in Section 3212 (choice of treatment by spiritual means) without substantive change. See Section 3212 Comment.

Prob. Code § 3202 (unchanged). Jurisdiction and venue

3202. The petition may be filed in the superior court of any of the following counties:

- (a) The county in which the patient resides.
- (b) The county in which the patient is temporarily living.
- (c) Such other county as may be in the best interests of the patient.

Prob. Code § 3203 (amended). Persons authorized to file petition

SEC. _____. Section 3203 of the Probate Code is amended to read:

3203. A petition may be filed by any of the following:

- (a) The patient.
- (b) The *patient's* spouse ~~of the patient~~.
- (c) A relative or friend of the patient, or other interested person, *including the patient's agent under a power of attorney for health care*.
- (d) The patient's physician.
- (e) A person acting on behalf of the ~~medical facility~~ *health care institution* in which the patient is located if the patient is in a ~~medical facility~~ *health care institution*.
- (f) The public guardian or such other county officer as is designated by the board of supervisors of the county in which the patient is located or resides or is temporarily living.

Comment. Section 3203 is amended to use the terminology of Section 3200. See Section 3200 Comment. Other technical, nonsubstantive changes are also made. Subdivision (c) is amended to make clear that an agent under a power of attorney for health care is an interested person. See Section 4607 ("agent" defined under Health Care Decisions Law).

Prob. Code § 3204 (amended). Contents of petition

SEC. _____. Section 3204 of the Probate Code is amended to read:

3204. The petition shall state, or set forth by *a* medical declaration attached thereto ~~to the petition~~, all of the following ~~so far as is known to the petitioner at the time the petition is filed~~:

- (a) The nature ~~condition~~ of the ~~medical condition of the patient which~~ *patient's health that* requires treatment.
- (b) The recommended ~~course of medical treatment which~~ *health care that* is considered to be medically appropriate.

(c) The threat to the health of the patient *patient's condition* if authorization for the recommended course of treatment *health care* is delayed or denied by the court.

(d) The predictable or probable outcome of the recommended course of treatment *health care*.

(e) The medically available alternatives, if any, to the course of treatment recommended *health care*.

(f) The efforts made to obtain an informed consent from the patient.

(g) If the petition is filed by a person on behalf of a medical facility *health care institution*, the name of the person to be designated to give consent to the recommended course of treatment *health care* on behalf of the patient.

(h) The deficit or deficits in the patient's mental functions listed in subdivision (a) of Section 811 ~~which~~ *that* are impaired, and ~~identifying an~~ *identification of* a link between the deficit or deficits and the patient's inability to respond knowingly and intelligently to queries about the recommended medical treatment *health care* or inability to participate in a treatment decision about the recommended medical treatment *health care* by means of a rational thought process.

(i) The names and addresses, so far as they are known to the petitioner, of the persons specified in subdivision (b) of Section 1821.

Comment. Section 3204 is amended to use the terminology of Section 3200. See Section 3200 Comment. Other technical, nonsubstantive changes are also made. The reference to "informed" consent is omitted as unnecessary. See Section 3208.5 Comment.

Prob. Code § 3205 (unchanged). Appointment of legal counsel

3205. Upon the filing of the petition, the court shall determine the name of the attorney the patient has retained to represent the patient in the proceeding under this part or the name of the attorney the patient plans to retain for that

purpose. If the patient has not retained an attorney and does not plan to retain one, the court shall appoint the public defender or private counsel under Section 1471 to consult with and represent the patient at the hearing on the petition and, if such appointment is made, Section 1472 applies.

Prob. Code § 3206 (amended). Notice of hearing

SEC. _____. Section 3206 of the Probate Code is amended to read:

3206. (a) Not less than 15 days before the hearing, notice of the time and place of the hearing and a copy of the petition shall be personally served on the patient and, the patient's attorney, *and the agent under the patient's power of attorney for health care, if any.*

(b) Not less than 15 days before the hearing, notice of the time and place of the hearing and a copy of the petition shall be mailed to the following persons:

(1) The *patient's* spouse, if any, ~~of the proposed conservatee~~ at the address stated in the petition.

(2) The *patient's* relatives named in the petition at their addresses stated in the petition.

(c) For good cause, the court may shorten or waive notice of the hearing as provided by this section. In determining the period of notice to be required, the court shall take into account both of the following:

(1) The existing medical facts and circumstances set forth in the petition or in a medical *affidavit declaration* attached to the petition or in a medical *affidavit declaration* presented to the court.

(2) The desirability, where the condition of the patient permits, of giving adequate notice to all interested persons.

Comment. Subdivision (b) of Section 3206 is amended to correct the reference to a "proposed conservatee." See Section 3200(d) ("patient" defined).

Subdivision (c) is amended to replace the references to “affidavit,” in conformity with Section 3204.

Prob. Code § 3207 (amended). Submission for determination on medical affidavits

SEC. _____. Section 3207 of the Probate Code is amended to read:

3207. Notwithstanding Section 3206, the matter presented by the petition may be submitted for the determination of the court on proper and sufficient medical affidavits—~~or~~ declarations if the attorney for the petitioner and the attorney for the patient so stipulate and further stipulate that there remains no issue of fact to be determined.

Comment. Section 3207 is amended to eliminate the reference to “affidavits,” in conformity with Section 3204.

Prob. Code § 3208 (amended). Order authorizing treatment

SEC. _____. Section 3208 of the Probate Code is amended to read:

3208. (a) *The Except as provided in subdivision (b), the court may make an order authorizing the recommended course of medical treatment of health care for the patient and designating a person to give consent to the recommended course of medical treatment health care on behalf of the patient if the court determines from the evidence all of the following:*

(1) The existing or continuing ~~medical~~ condition of the ~~patient~~ *patient’s health* requires the recommended ~~course of medical treatment~~ *health care*.

(2) If untreated, there is a probability that the condition will become life-endangering or result in a serious threat to the physical or mental health of the patient.

(3) The patient is unable to ~~give an informed~~ consent to the recommended ~~course of treatment~~ *health care*.

(b) In determining whether the patient's mental functioning is so severely impaired that the patient lacks the capacity to make any health care decision, the court may take into consideration the frequency, severity, and duration of periods of impairment.

(c) The court may make an order authorizing withholding or withdrawing artificial nutrition and hydration and all other forms of health care and designating a person to give or withhold consent to the recommended health care on behalf of the patient if the court determines from the evidence all of the following:

(1) The recommended health care is in accordance with the patient's best interest, taking into consideration the patient's personal values to the extent known to the petitioner.

(2) The patient is unable to consent to the recommended health care.

(d) Instead of designating a person to make health care decisions on behalf of the patient under this section, the court may refer the matter to a surrogate committee under Chapter 4 (commencing with Section 4720) of Part 2 of Division 4.7. If there is no appropriate surrogate committee in existence, the court may order creation of a surrogate committee to act under Chapter 4 (commencing with Section 4720) of Part 2 of Division 4.7.

~~(b) If the patient has the capacity to give informed consent to the recommended course of medical treatment, the court shall so find in its order.~~

~~(c) If the court finds that the patient has the capacity to give informed consent to the recommended course of medical treatment, but that the patient refuses consent, the court shall not make an order authorizing the course of recommended medical treatment or designating a person to give consent to such treatment. If an order has been made authorizing the recommended course of medical treatment and designating a~~

~~person to give consent to that treatment, the order shall be revoked if the court determines that the patient has recovered the capacity to give informed consent to the recommended course of medical treatment. Until revoked or modified, the order is effective authorization for the course of medical treatment.~~

~~(d) In a proceeding under this part, where the court has determined that the patient has the capacity to give informed consent, the court shall, if requested, determine whether the patient has accepted or refused the recommended course of treatment, and whether a patient's consent to the recommended course of treatment is an informed consent.~~

Comment. Subdivision (a) of Section 3208 is amended to use the terminology of Section 3200. See Section 3200 Comment. Other technical, nonsubstantive changes are also made. The reference to “informed” consent has been omitted as surplus. See Section 3805 Comment.

New subdivision (b) continues former subdivision (d) of Section 3201 without substantive change.

A new subdivision (c) is added to permit withholding or withdrawal of health care, including artificial nutrition and hydration. This amendment extends the authority of the court to authorize health care decisions to the same extent as surrogates and subject to the same standards as provided in the Health Care Decisions Law. See, e.g., Sections 4684 (standard governing agent's health care decisions under power of attorney for health care), 4714 (standard governing surrogate's health care decisions).

New subdivision (d) provides a mechanism for the court to use the surrogate committee procedure in the Health Care Decisions Law. See Sections 4720-4726. In such a case, the surrogate committee would be governed by the Health Care Decisions Law, except as limited by the court's order. Nothing in this section is intended to encourage court control or involvement in the surrogate committee process, but in appropriate cases, such as where continuing health care decisions will need to be made, the surrogate committee may offer the best approach.

Former subdivisions (b)-(d) are continued in Section 3208.5 without substantive change. See Section 3208.5 Comment.

Prob. Code § 3208.5 (added). Effect of order determining that patient has capacity

SEC. _____. Section 3208.5 is added to the Probate Code, to read:

3208.5. In a proceeding under this part:

(a) Where the patient has the capacity to consent to the recommended health care, the court shall so find in its order.

(b) Where the court has determined that the patient has the capacity to consent to the recommended health care, the court shall, if requested, determine whether the patient has accepted or refused the recommended health care, and whether the patient's consent to the recommended health care is an informed consent.

(c) Where the court finds that the patient has the capacity to consent to the recommended health care, but that the patient refuses consent, the court shall not make an order authorizing the recommended health care or designating a person to give consent to the recommended health care. If an order has been made authorizing the recommended health care and designating a person to give consent to the recommended health care, the order shall be revoked if the court determines that the patient has recovered the capacity to consent to the recommended health care. Until revoked or modified, the order is effective authorization for the recommended health care.

Comment. Section 3208.5 continues former subdivisions (b)-(d) of Section 3208 without substantive change. The subdivisions have been placed in a different order. Terminology has been conformed to the definitions in Section 3200. Thus, for example, "health care" replaces "medical treatment" appearing in the former provision. Except in subdivision (b), references to "informed" consent have been omitted as surplus and for consistency with other provisions in this part and in the Health Care Decisions Law (Section 4600 *et seq.*). To be effective, the patient's consent must satisfy the law of informed consent.

Prob. Code § 3209 (unchanged). Continuing jurisdiction of court

3209. The court in which the petition is filed has continuing jurisdiction to revoke or modify an order made under this part upon a petition filed, noticed, and heard in the same manner as an original petition filed under this part.

Prob. Code § 3210 (amended). Procedure supplemental and alternative

SEC. _____. Section 3210 of the Probate Code is amended to read:

3210. (a) This part is supplemental and alternative to other procedures or methods for obtaining ~~medical~~ consent *to health care or making health care decisions, and is permissive and cumulative for the relief to which it applies.*

(b) Nothing in this part limits the providing of ~~medical treatment~~ *health care* in an emergency case in which the ~~medical treatment~~ *health care* is required because (1) such ~~treatment~~ *the health care* is required for the alleviation of severe pain or (2) the patient has a medical condition ~~which~~ *that*, if not immediately diagnosed and treated, will lead to serious disability or death.

(c) Nothing in this part supersedes the right that any person may have under existing law to make health care decisions on behalf of a patient, or affects the decisionmaking process of a health care institution.

Comment. Subdivisions (a) and (b) of Section 3210 are amended to use the terminology of Section 3200. See Section 3200 Comment. Other technical, nonsubstantive changes are also made. The second clause added to subdivision (a) continues former subdivision (f) of Section 3201 without substantive change. The erroneous reference to “this chapter” in the former provision is corrected.

Subdivision (c) continues former subdivision (e) of Section 3201, with revisions reflecting the replacement of Health and Safety Code Section 1418.8 with Probate Code Sections 4720-4726 (surrogate committee). Subdivision (c) thus applies to all health care institutions, as defined in Section 3200(c), not just long-term health care facilities, as defined in

former Health and Safety Code Section 1418.8(b). Other technical, nonsubstantive changes are also made.

Prob. Code § 3211 (amended). Limitations on part

SEC. _____. Section 3211 of the Probate Code is amended to read:

3211. (a) No person may be placed in a mental health treatment facility under the provisions of this part.

(b) No experimental drug as defined in Section 111515 of the Health and Safety Code may be prescribed for or administered to any person under this part.

(c) No convulsive treatment as defined in Section 5325 of the Welfare and Institutions Code may be performed on any person under this part.

(d) No person may be sterilized under this part.

(e) The provisions of this part are subject to ~~any of the following instruments if~~ a valid and effective: *advance health care directive under the Health Care Decisions Law, Division 4.7 (commencing with Section 4600).*

~~(1) A directive of the patient under Chapter 3.9 (commencing with Section 7185) of Part 1 of Division 7 of the Health and Safety Code (Natural Death Act).~~

~~(2) A power of attorney for health care, whether or not a durable power of attorney.~~

Comment. Subdivision (e) of Section 3211 is amended to use the inclusive term “advance health care directive” used in the Health Care Decisions Law. This continues the substance of former law, since declarations under the former Natural Death Act and powers of attorney for health care are types of advance directives. See Section 4605 & Comment. Also covered by this language are “individual health care instructions.” See Section 4623 & Comment.

Prob. Code § 3212 (added). Choice of treatment by spiritual means

SEC. _____. Section 3212 is added to the Probate Code, to read:

3212. Nothing in this part shall be construed to supersede or impair the right of any individual to choose treatment by spiritual means in lieu of medical treatment, nor shall any individual choosing treatment by spiritual means, in accordance with the tenets and practices of that individual's established religious tradition, be required to submit to medical testing of any kind pursuant to a determination of capacity.

Comment. Section 3212 continues former subdivision (g) of Section 3201 without substantive change. The former reference to "competency" has been changed to "capacity" to conform to the terminology of this part and related statutes. See, e.g., Section 3201 (capacity determination).

Prob. Code § 3722 (technical amendment). Effect of dissolution, annulment, or legal separation on power of attorney involving federal absentees

SEC. _____. Section 3722 of the Probate Code is amended to read:

3722. If after the absentee executes a power of attorney, the principal's spouse who is the attorney-in-fact commences a proceeding for dissolution, annulment, or legal separation, or a legal separation is ordered, the attorney-in-fact's authority is revoked. This section is in addition to the provisions of ~~Section~~ *Sections 4154 and 4697*.

Comment. Section 3722 is amended to refer to a corresponding section concerning advance health care directives.

See also Sections 1403 ("absentee" defined), 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined).

Prob. Code § 4050 (amended). Types of powers of attorney governed by this division

SEC. _____. Section 4050 of the Probate Code is amended to read:

4050. (a) This division applies to the following:

(1) Durable powers of attorney, *other than powers of attorney for health care governed by Division 4.7 (commencing with Section 4600)*.

(2) Statutory form powers of attorney under Part 3 (commencing with Section 4400).

(3) ~~Durable powers of attorney for health care under Part 4 (commencing with Section 4600).~~

(4) Any other power of attorney that incorporates or refers to this division or the provisions of this division.

(b) This division does not apply to the following:

(1) A power of attorney to the extent that the authority of the attorney-in-fact is coupled with an interest in the subject of the power of attorney.

(2) Reciprocal or interinsurance exchanges and their contracts, subscribers, attorneys-in-fact, agents, and representatives.

(3) A proxy given by an attorney-in-fact to another person to exercise voting rights.

(c) This division is not intended to affect the validity of any instrument or arrangement that is not described in subdivision (a).

Comment. Section 4050 is amended to reflect the revision of the law relating to powers of attorney for health care. See Section 4600 *et seq.* (Health Care Decisions Law). Division 4.5 no longer governs powers of attorney for health care.

Revised 1994 Comment. Section 4050 describes the types of instruments that are subject to the Power of Attorney Law. If a section in this division refers to a “power of attorney,” it generally refers to a durable power of attorney, but may, under certain circumstances, also apply to a nondurable power of attorney. For example, a statutory form power of attorney may be durable or nondurable. See Sections 4401, 4404. A nondurable power may incorporate provisions of this division, thereby becoming subject to its provisions as provided in Section 4050(a)(4).

Subdivision (b) makes clear that certain specialized types of power of attorney are not subject to the Power of Attorney Law. This list is not intended to be exclusive. See subdivision (c). Subdivision (b)(1) recognizes the special rule applicable to a power coupled with an interest in the subject of a power of attorney provided in Civil Code Section 2356(a). Subdivision (b)(2) continues the substance of the limitation in former Civil Code Section 2420(b) and broadens it to apply to the entire

Power of Attorney Law. See Ins. Code § 1280 *et seq.* For the rules applicable to proxy voting in business corporations, see Corp. Code § 705. For other statutes dealing with proxies, see Corp. Code §§ 178, 702, 5069, 5613, 7613, 9417, 12405, 13242; Fin. Code §§ 5701, 5702, 5710, 6005. See also Civ. Code § 2356(e) (proxy under general agency rules).

Subdivision (c) makes clear that this division does not affect the validity of other agencies and powers of attorney. The Power of Attorney Law thus does not apply to other specialized agencies, such as real estate agents under Civil Code Sections 2373-2382. As a corollary, an instrument denominated a power of attorney that does not satisfy the execution requirements for a power of attorney under this division may be valid under general agency law or other principles.

See also Sections 4014 (“attorney-in-fact” defined), 4018 (“durable power of attorney” defined), 4022 (“power of attorney” defined).

Prob. Code § 4100 (amended). Application of part

SEC. _____. Section 4100 of the Probate Code is amended to read:

4100. This part applies to all powers of attorney under this division, subject to any special rules applicable to statutory form powers of attorney under Part 3 (commencing with Section 4400) ~~or durable powers of attorney for health care under Part 4 (commencing with Section 4600).~~

Comment. Section 4100 is amended to delete a reference to powers of attorney for health care, which are governed by Division 4.7 (commencing with Section 4600) (Health Care Decisions Law). See also Section 4050 (types of powers of attorney governed by this division).

Prob. Code § 4121 (amended). Formalities for executing a power of attorney

SEC. _____. Section 4121 of the Probate Code is amended to read:

4121. A power of attorney is legally sufficient if all of the following requirements are satisfied:

- (a) The power of attorney contains the date of its execution.
- (b) The power of attorney is signed either (1) by the principal or (2) in the principal’s name by ~~some other person~~

another adult in the principal's presence and at the principal's direction.

(c) The power of attorney is either (1) acknowledged before a notary public or (2) signed by at least two witnesses who satisfy the requirements of Section 4122.

Comment. Subdivision (b) of Section 4121 is amended to make clear that the person signing at the principal's direction must be an adult. This is consistent with the language of Section 4680 (formalities for executing power of attorney for health care).

Prob. Code § 4122 (amended). Requirements for witnesses

SEC. _____. Section 4122 of the Probate Code is amended to read:

4122. If the power of attorney is signed by witnesses, as provided in Section 4121, the following requirements shall be satisfied:

(a) The witnesses shall be adults.

(b) The attorney-in-fact may not act as a witness.

(c) Each witness signing the power of attorney shall witness either the signing of the instrument by the principal or the principal's acknowledgment of the signature or the power of attorney.

~~(d) In the case of a durable power of attorney for health care, the additional requirements of Section 4701.~~

Comment. Section 4122 is amended to delete a reference to powers of attorney for health care, which are governed by Division 4.7 (commencing with Section 4600) (Health Care Decisions Law).

This section is not subject to limitation in the power of attorney. See Section 4101. See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026 ("principal" defined).

Prob. Code § 4123 (amended). Permissible purposes

SEC. _____. Section 4123 of the Probate Code is amended to read:

4123. (a) In a power of attorney, a principal may grant authority to an attorney-in-fact to act on the principal's behalf

with respect to all lawful subjects and purposes or with respect to one or more express subjects or purposes. The attorney-in-fact may be granted authority with regard to the principal's property, personal care, health care, or any other matter.

(b) With regard to property matters, a power of attorney may grant authority to make decisions concerning all or part of the principal's real and personal property, whether owned by the principal at the time of the execution of the power of attorney or thereafter acquired or whether located in this state or elsewhere, without the need for a description of each item or parcel of property.

(c) With regard to personal care, a power of attorney may grant authority to make decisions relating to the personal care of the principal, including, but not limited to, determining where the principal will live, providing meals, hiring household employees, providing transportation, handling mail, and arranging recreation and entertainment.

~~(d) With regard to health care, a power of attorney may grant authority to make health care decisions, both before and after the death of the principal, as provided in Part 4 (commencing with Section 4600).~~

Comment. Section 4123 is amended to delete subdivision (d), which referred to powers of attorney for health care that are now governed by Division 4.7 (commencing with Section 4600) (Health Care Decisions Law). See Section 4050 (types of powers of attorney governed by this division).

Revised 1994 Comment. Subdivision (a) of Section 4123 is new and is consistent with the general agency rules in Civil Code Sections 2304 and 2305. For provisions concerning the duties and powers of an attorney-in-fact, see Sections 4230-4266. See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026 ("principal" defined).

Subdivision (b) continues former Civil Code Section 2513 without substantive change. This subdivision makes clear that a power of attorney may by its terms apply to all real property of the principal, including after-acquired property, without the need for a specific

description of the real property to which the power applies. This section is consistent with Section 4464 (after-acquired property under statutory form power of attorney).

Subdivision (c) is new and acknowledges the existing practice of providing authority to make personal care decisions in durable powers of attorney. For a comparable provision in the Health Care Decisions Law, see Section 4671.

Prob. Code § 4128 (amended). Warning statement in durable power of attorney

SEC. _____. Section 4128 of the Probate Code is amended to read:

4128. (a) Subject to subdivision (b), a printed form of a durable power of attorney that is sold or otherwise distributed in this state for use by a person who does not have the advice of legal counsel shall contain, in not less than 10-point boldface type or a reasonable equivalent thereof, the following warning statement:

**NOTICE TO PERSON EXECUTING DURABLE
POWER OF ATTORNEY**

A durable power of attorney is an important legal document. By signing the durable power of attorney, you are authorizing another person to act for you, the principal. Before you sign this durable power of attorney, you should know these important facts:

Your agent (attorney-in-fact) has no duty to act unless you and your agent agree otherwise in writing.

This document gives your agent the powers to manage, dispose of, sell, and convey your real and personal property, and to use your property as security if your agent borrows money on your behalf.

Your agent will have the right to receive reasonable payment for services provided under this durable power of

attorney unless you provide otherwise in this power of attorney.

The powers you give your agent will continue to exist for your entire lifetime, unless you state that the durable power of attorney will last for a shorter period of time or unless you otherwise terminate the durable power of attorney. The powers you give your agent in this durable power of attorney will continue to exist even if you can no longer make your own decisions respecting the management of your property.

You can amend or change this durable power of attorney only by executing a new durable power of attorney or by executing an amendment through the same formalities as an original. You have the right to revoke or terminate this durable power of attorney at any time, so long as you are competent.

This durable power of attorney must be dated and must be acknowledged before a notary public or signed by two witnesses. If it is signed by two witnesses, they must witness either (1) the signing of the power of attorney or (2) the principal's signing or acknowledgment of his or her signature. A durable power of attorney that may affect real property should be acknowledged before a notary public so that it may easily be recorded.

You should read this durable power of attorney carefully. When effective, this durable power of attorney will give your agent the right to deal with property that you now have or might acquire in the future. The durable power of attorney is important to you. If you do not understand the durable power of attorney, or any provision of it, then you should obtain the assistance of an attorney or other qualified person.

(b) Nothing in subdivision (a) invalidates any transaction in which a third person relied in good faith on the authority created by the durable power of attorney.

(c) This section does not apply to the following:

(1) ~~A a statutory form power of attorney under Part 3 (commencing with Section 4400).~~

(2) ~~A durable power of attorney for health care under Part 4 (commencing with Section 4600).~~

Comment. Subdivision (c) of Section 4128 is amended to delete a reference to powers of attorney for health care, which are governed by Division 4.7 (commencing with Section 4600) (Health Care Decisions Law). This is a technical, nonsubstantive change.

Revised 1994 Comment. The warning statement in subdivision (a) of Section 4128 replaces the statement provided in former Civil Code Section 2510(b). Subdivision (b) restates former Civil Code Section 2510(c) without substantive change. Subdivision (c) restates former Civil Code Section 2510(a) without substantive change, but the reference to statutory short form powers of attorney under former Civil Code Section 2450 is omitted as obsolete. This section is not subject to limitation in the power of attorney. See Section 4101(b).

Other provisions prescribe the contents of the warning statements for particular types of durable powers of attorney. See Section 4401 (statutory form power of attorney).

Section 4102 permits a printed form to be used after January 1, 1995, if the form complies with prior law. A form printed after January 1, 1986, may be sold or otherwise distributed in this state only if it complies with the requirements of Section 4128 (or its predecessor, former Civil Code Section 2510). See Section 4102(b).

See also Sections 4014 (“attorney-in-fact” defined), 4018 (“durable power of attorney” defined), 4026 (“principal” defined), 4034 (“third person” defined).

Prob. Code § 4203 (amended). Successor attorneys-in-fact

SEC. _____. Section 4203 of the Probate Code is amended to read:

4203. (a) A principal may designate one or more successor attorneys-in-fact to act if the authority of a predecessor attorney-in-fact terminates.

(b) The principal may grant authority to another person, designated by name, by office, or by function, including the initial and any successor attorneys-in-fact, to designate at any time one or more successor attorneys-in-fact. ~~This subdivision~~

~~does not apply to a durable power of attorney for health care under Part 4 (commencing with Section 4600).~~

(c) A successor attorney-in-fact is not liable for the actions of the predecessor attorney-in-fact.

Comment. Section 4203 is amended to delete a reference to powers of attorney for health care, which are governed by Division 4.7 (commencing with Section 4600) (Health Care Decisions Law). This is a technical, nonsubstantive change.

Prob. Code § 4206 (amended). Relation of attorney-in-fact to court-appointed fiduciary

SEC. _____. Section 4206 of the Probate Code is amended to read:

4206. (a) If, following execution of a durable power of attorney, a court of the principal's domicile appoints a conservator of the estate, guardian of the estate, or other fiduciary charged with the management of all of the principal's property or all of the principal's property except specified exclusions, the attorney-in-fact is accountable to the fiduciary as well as to the principal. Except as provided in subdivision (b), the fiduciary has the same power to revoke or amend the durable power of attorney that the principal would have had if not incapacitated, subject to any required court approval.

(b) If a conservator of the estate is appointed by a court of this state, the conservator can revoke or amend the durable power of attorney only if the court in which the conservatorship proceeding is pending has first made an order authorizing or requiring the fiduciary to modify or revoke the durable power of attorney and the modification or revocation is in accord with the order.

~~(c) This section does not apply to a durable power of attorney for health care.~~

~~(d) This section is not subject to limitation in the power of attorney.~~

Comment. Section 4206 is amended to delete a reference to powers of attorney for health care, which are governed by Division 4.7 (commencing with Section 4600) (Health Care Decisions Law). This is a technical, nonsubstantive change.

Prob. Code § 4260 (amended). Limitation on article

SEC. _____. Section 4260 of the Probate Code is amended to read:

4260. This article does not apply to ~~the following:~~

~~(a) Statutory *statutory* form powers of attorney under Part 3 (commencing with Section 4400).~~

~~(b) Durable powers of attorney for health care under Part 4 (commencing with Section 4600).~~

Comment. Section 4260 is amended to delete a reference to powers of attorney for health care, which are governed by Division 4.7 (commencing with Section 4600) (Health Care Decisions Law). This is a technical, nonsubstantive change.

Prob. Code § 4265 (amended). Excluded authority

SEC. _____. Section 4265 of the Probate Code is amended to read:

4265. A power of attorney may not authorize an attorney-in-fact to ~~perform any of the following acts:~~

~~(a) Make *make*, publish, declare, amend, or revoke the principal's will.~~

~~(b) Consent to any action under a durable power of attorney for health care forbidden by Section 4722.~~

Comment. Section 4265 is amended to delete a reference to powers of attorney for health care, which are governed by Division 4.7 (commencing with Section 4600) (Health Care Decisions Law). See Section 4050 (scope of division).

Section 4265 is consistent with the general agency rule in Civil Code Section 2304. See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026 (“principal” defined).

Prob. Code §§ 4500-4545 (added). Judicial proceedings concerning powers of attorney

SEC. _____. Part 4 (commencing with Section 4500) is added to Division 4.5 of the Probate Code, to read:

PART 4. JUDICIAL PROCEEDINGS
CONCERNING POWERS OF ATTORNEY

CHAPTER 1. GENERAL PROVISIONS

§ 4500. Power of attorney freely exercisable

4500. A power of attorney is exercisable free of judicial intervention, subject to this part.

Comment. Section 4500 continues former Section 4900 without change. See also Section 4022 (“power of attorney” defined).

§ 4501. Cumulative remedies

4501. The remedies provided in this part are cumulative and not exclusive of any other remedies provided by law.

Comment. Section 4501 continues former Section 4901 without change.

§ 4502. Effect of provision in power of attorney attempting to limit right to petition

4502. Except as provided in Section 4503, this part is not subject to limitation in the power of attorney.

Comment. Section 4502 continues former Section 4902 without change. See also Sections 4022 (“power of attorney” defined), 4101(b) (general rule on limitations provided in power of attorney).

§ 4503. Limitations on right to petition

4503. (a) Subject to subdivision (b), a power of attorney may expressly eliminate the authority of a person listed in Section 4540 to petition the court for any one or more of the purposes enumerated in Section 4541 if both of the following requirements are satisfied:

(1) The power of attorney is executed by the principal at a time when the principal has the advice of a lawyer authorized to practice law in the state where the power of attorney is executed.

(2) The principal's lawyer signs a certificate stating in substance:

"I am a lawyer authorized to practice law in the state where this power of attorney was executed, and the principal was my client at the time this power of attorney was executed. I have advised my client concerning his or her rights in connection with this power of attorney and the applicable law and the consequences of signing or not signing this power of attorney, and my client, after being so advised, has executed this power of attorney."

(b) A power of attorney may not limit the authority of the attorney-in-fact, the principal, the conservator of the person or estate of the principal, or the public guardian to petition under this part.

Comment. Subdivision (a) of Section 4503 continues former Section 4903(a) without change, except that the reference to the section governing petitions relating to powers of attorney for health care (former Section 4942) is omitted. Powers of attorney for health care are governed by Division 4.7 (commencing with Section 4600).

Subdivision (a) makes clear that a power of attorney may limit the applicability of this part only if it is executed with the advice and approval of the principal's counsel. This limitation is designed to ensure that the execution of a power of attorney that restricts the remedies of this part is accomplished knowingly by the principal. The inclusion of a provision in the power of attorney making this part inapplicable does not affect the right to resort to any judicial remedies that may otherwise be available. See Section 4501.

Subdivision (b) continues the part of former Section 4903(b) relating to non-health care powers of attorney without substantive change, except that the reference to the conservator of the person of the principal is added for consistency with Section 4540(e).

See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026 ("principal" defined).

§ 4504. Jury trial

4504. There is no right to a jury trial in proceedings under this division.

Comment. Section 4504 continues former Section 4904 without change. This section is consistent with the rule applicable to other fiduciaries. See Prob. Code §§ 1452 (guardianships and conservatorships), 7200 (decedents' estates), 17006 (trusts).

§ 4505. Application of general procedural rules

4505. Except as otherwise provided in this division, the general provisions in Division 3 (commencing with Section 1000) apply to proceedings under this division.

Comment. Section 4505 continues former Section 4905 without change, and provides a cross reference to the general procedural rules that apply to this division. See, e.g., Sections 1003 (guardian ad litem), 1021 (verification required), 1041 (clerk to set matters for hearing), 1046 (hearing and orders), 1203 (order shortening time for notice), 1215-1216 (service), 1260 (proof of service).

CHAPTER 2. JURISDICTION AND VENUE

§ 4520. Jurisdiction and authority of court or judge

4520. (a) The superior court has jurisdiction in proceedings under this division.

(b) The court in proceedings under this division is a court of general jurisdiction and the court, or a judge of the court, has the same power and authority with respect to the proceedings as otherwise provided by law for a superior court, or a judge of the superior court, including, but not limited to, the matters authorized by Section 128 of the Code of Civil Procedure.

Comment. Section 4520 continues former Section 4920 without change, and is comparable to Section 7050 governing the jurisdiction and authority of the court in proceedings concerning administration of decedents' estates. See Section 7050 Comment.

§ 4521. Basis of jurisdiction

4521. The court may exercise jurisdiction in proceedings under this division on any basis permitted by Section 410.10 of the Code of Civil Procedure.

Comment. Section 4521 continues former Section 4921 without change, and is comparable to Section 17004 (jurisdiction under Trust Law). This section recognizes that the court, in proceedings relating to powers of attorney under this division, may exercise jurisdiction on any basis that is not inconsistent with the California or United States Constitutions, as provided in Code of Civil Procedure Section 410.10. See generally Judicial Council Comment to Code Civ. Proc. § 410.10; Prob. Code § 17004 Comment (basis of jurisdiction under Trust Law).

§ 4522. Jurisdiction over attorney-in-fact

4522. Without limiting Section 4521, a person who acts as an attorney-in-fact under a power of attorney governed by this division is subject to personal jurisdiction in this state with respect to matters relating to acts and transactions of the attorney-in-fact performed in this state or affecting property or a principal in this state.

Comment. Section 4522 continues former Section 4922 without change, and is comparable to Sections 3902(b) (jurisdiction over custodian under Uniform Transfers to Minors Act) and 17003(a) (jurisdiction over trustee). This section is intended to facilitate exercise of the court's power under this part when the court's jurisdiction is properly invoked. As recognized by the introductory clause, constitutional limitations on assertion of jurisdiction apply to the exercise of jurisdiction under this section. Consequently, appropriate notice must be given to an attorney-in-fact as a condition of personal jurisdiction. *Cf.* *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026 ("principal" defined).

§ 4523. Venue

4523. The proper county for commencement of a proceeding under this division shall be determined in the following order of priority:

- (a) The county in which the principal resides.

(b) The county in which the attorney-in-fact resides.

(c) A county in which property subject to the power of attorney is located.

(d) Any other county that is in the principal's best interest.

Comment. Section 4523 continues former Section 4923 without change. This section is drawn from the rules applicable to guardianships and conservatorships. See Sections 2201-2202. See also Section 4053 (durable powers of attorney under law of another jurisdiction).

CHAPTER 3. PETITIONS, ORDERS, APPEALS

§ 4540. Petitioners

4540. Subject to Section 4503, a petition may be filed under this part by any of the following persons:

(a) The attorney-in-fact.

(b) The principal.

(c) The spouse of the principal.

(d) A relative of the principal.

(e) The conservator of the person or estate of the principal.

(f) The court investigator, described in Section 1454, of the county where the power of attorney was executed or where the principal resides.

(g) The public guardian of the county where the power of attorney was executed or where the principal resides.

(h) The personal representative or trustee of the principal's estate.

(i) The principal's successor in interest.

(j) A person who is requested in writing by an attorney-in-fact to take action.

(k) Any other interested person or friend of the principal.

Comment. Section 4540 continues former Section 4940 without change, except that the reference to the treating health care provider in former subdivision (h) is omitted. Powers of attorney for health care are governed by Division 4.7 (commencing with Section 4600). The purposes for which a person may file a petition under this part are limited by other rules. See Sections 4502 (effect of provision in power of attorney attempting to limit right to petition), 4503 (limitations on right

to petition); see also Section 4501 (other remedies not affected). See also the comparable rules governing petitioners for appointment of a conservator under Section 1820.

See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026 (“principal” defined).

§ 4541. Petition as to powers of attorney

4541. A petition may be filed under this part for any one or more of the following purposes:

(a) Determining whether the power of attorney is in effect or has terminated.

(b) Passing on the acts or proposed acts of the attorney-in-fact, including approval of authority to disobey the principal’s instructions pursuant to subdivision (b) of Section 4234.

(c) Compelling the attorney-in-fact to submit the attorney-in-fact’s accounts or report the attorney-in-fact’s acts as attorney-in-fact to the principal, the spouse of the principal, the conservator of the person or the estate of the principal, or to any other person required by the court in its discretion, if the attorney-in-fact has failed to submit an accounting or report within 60 days after written request from the person filing the petition.

(d) Declaring that the authority of the attorney-in-fact is revoked on a determination by the court of all of the following:

(1) The attorney-in-fact has violated or is unfit to perform the fiduciary duties under the power of attorney.

(2) At the time of the determination by the court, the principal lacks the capacity to give or to revoke a power of attorney.

(3) The revocation of the attorney-in-fact’s authority is in the best interest of the principal or the principal’s estate.

(e) Approving the resignation of the attorney-in-fact:

(1) If the attorney-in-fact is subject to a duty to act under Section 4230, the court may approve the resignation, subject

to any orders the court determines are necessary to protect the principal's interests.

(2) If the attorney-in-fact is not subject to a duty to act under Section 4230, the court shall approve the resignation, subject to the court's discretion to require the attorney-in-fact to give notice to other interested persons.

(f) Compelling a third person to honor the authority of an attorney-in-fact.

Comment. Section 4541 continues former Section 4941 without change, except that the reference to powers of attorney for health care in the introductory paragraph of former law is omitted. Powers of attorney for health care are governed by Division 4.7 (commencing with Section 4600). This section applies to petitions concerning both durable and nondurable powers of attorney. See Sections 4022 ("power of attorney" defined), 4050 (scope of division).

Subdivision (a) makes clear that a petition may be filed to determine whether the power of attorney was ever effective, thus permitting, for example, a determination that the power of attorney was invalid when executed because its execution was induced by fraud. See also Section 4201 (unqualified attorney-in-fact).

The authority to petition to disobey the principal's instructions in subdivision (b) is new. This is a limitation on the general agency rule in Civil Code Section 2320. See Section 4234 (duty to follow instructions) & Comment.

Subdivision (d) requires a court determination that the principal has become incapacitated before the court is authorized to declare the power of attorney terminated because the attorney-in-fact has violated or is unfit to perform the fiduciary duties under the power of attorney.

Subdivision (e) provides a procedure for accepting the attorney-in-fact's resignation. The court's discretion in this type of case depends on whether the attorney-in-fact is subject to any duty to act under Section 4230, as in the situation where the attorney-in-fact has agreed in writing to act or is involved in an ongoing transaction. Under subdivision (e)(1) the court may make any necessary protective order. Under subdivision (e)(2), the court's discretion is limited to requiring that notice be given to others who may be expected to look out for the principal's interests, such as a public guardian or a relative. In addition, the attorney-in-fact is required to comply with the statutory duties on termination of authority. See Section 4238. The availability of this procedure is not intended to imply that an attorney-in-fact must or should petition for judicial

acceptance of a resignation where the attorney-in-fact is not subject to a duty to act.

Subdivision (f) provides a remedy to achieve compliance with the power of attorney through recognition of the attorney-in-fact's authority. This remedy is also available to compel disclosure of information under Section 4235 (consultation and disclosure). See Section 4300 *et seq.* (relations with third persons).

A power of attorney may limit the authority to petition under this part. See Sections 4502 (effect of provision in power of attorney attempting to limit right to petition), 4503 (limitations on right to petition).

See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026 ("principal" defined).

§ 4542. Commencement of proceeding

4542. A proceeding under this part is commenced by filing a petition stating facts showing that the petition is authorized under this part, the grounds of the petition, and, if known to the petitioner, the terms of the power of attorney.

Comment. Section 4542 continues former Section 4943 without change. For a comparable provision, see Section 17201 (commencement of proceeding under Trust Law). A petition is required to be verified. See Section 1021.

See also Section 4022 ("power of attorney" defined).

§ 4543. Dismissal of petition

4543. The court may dismiss a petition if it appears that the proceeding is not reasonably necessary for the protection of the interests of the principal or the principal's estate and shall stay or dismiss the proceeding in whole or in part when required by Section 410.30 of the Code of Civil Procedure.

Comment. Section 4543 continues former Section 4944 without change. Under former Section 4944, the dismissal standard was revised to permit dismissal when the proceeding is not "reasonably necessary," rather than "necessary" as under the prior section (Civil Code Section 2416). Under this section, the court has authority to stay or dismiss a proceeding in this state if, in the interest of substantial justice, the proceeding should be heard in a forum outside this state. See Code Civ. Proc. § 410.30.

See also Section 4026 ("principal" defined).

§ 4544. Notice of hearing

4544. (a) Subject to subdivision (b), at least 15 days before the time set for hearing, the petitioner shall serve notice of the time and place of the hearing, together with a copy of the petition, on the following:

- (1) The attorney-in-fact if not the petitioner.
- (2) The principal if not the petitioner.

(b) In the case of a petition to compel a third person to honor the authority of an attorney-in-fact, notice of the time and place of the hearing, together with a copy of the petition, shall be served on the third person in the manner provided in Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure.

Comment. Subdivision (a) of Section 4544, pertaining to internal affairs of the power of attorney, continues former Section 4945(a) without change.

Subdivision (b) continues former Section 4945(b) without change, and provides a special rule applicable to service of notice in proceedings involving third persons, i.e., not internal affairs of the power of attorney. See Section 4541(f) (petition to compel third person to honor attorney-in-fact's authority).

See also Sections 4014 ("attorney-in-fact" defined), 4026 ("principal" defined).

§ 4545. Award of attorney's fees

4545. In a proceeding under this part commenced by the filing of a petition by a person other than the attorney-in-fact, the court may in its discretion award reasonable attorney's fees to one of the following:

(a) The attorney-in-fact, if the court determines that the proceeding was commenced without any reasonable cause.

(b) The person commencing the proceeding, if the court determines that the attorney-in-fact has clearly violated the fiduciary duties under the power of attorney or has failed without any reasonable cause or justification to submit accounts or report acts to the principal or conservator of the

estate or of the person, as the case may be, after written request from the principal or conservator.

Comment. Section 4545 continues former Section 4947 without change.

See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026 (“principal” defined).

Prob. Code §§ 4600-4806 (repealed). Durable powers of attorney for health care

SEC. _____. Part 4 (commencing with Section 4600) of Division 4.5 of the Probate Code is repealed.

Comment. Former Sections 4600-4806 are superseded by relevant parts of the Health Care Decisions Law, Division 4.7 (commencing with Section 4600). See former Section 4600-4806 Comments.

§ 4600 (repealed). Application of definitions

Comment. Former Section 4600 is continued in Section 4603 without substantive change.

§ 4603 (repealed). Community care facility

Comment. Former Section 4603 is continued in Section 4611 without substantive change.

§ 4606 (repealed). Durable power of attorney for health care

Comment. Former Section 4606 is superseded by Section 4629 (“power of attorney for health care” defined). See Section 4629 Comment. The durability of powers of attorney for health care is implicit, so the term has been shortened in the new law to “power of attorney for health care.”

§ 4609 (repealed). Health care

Comment. The first part of former Section 4609 is continued in Section 4615 without substantive change. The language relating to decisions affecting the principal after death is not continued in the definition, but the authority is continued in Section 4683(b) without substantive change.

§ 4612 (repealed). Health care decision

Comment. Former Section 4612 is superseded by Section 4617. See Section 4617 Comment.

§ 4615 (repealed). Health care provider

Comment. Former Section 4615 is continued in Section 4621 without substantive change.

§ 4618 (repealed). Residential care facility for the elderly

Comment. Former Section 4618 is continued in Section 4637 without substantive change.

§ 4621 (repealed). Statutory form durable power of attorney for health care

Comment. Former Section 4621 is not continued. For the replacement statutory form, see Section 4701 (optional form of advance health care directive).

§ 4650 (repealed). Application of chapter

Comment. Former Section 4650 is superseded by Section 4671 and related authority in the Health Care Decisions Law. For the application of the new law to existing advance health care directives, see Section 4665 & Comment.

§ 4651 (repealed). Form of durable power of attorney for health care after January 1, 1995

Comment. Former Section 4651 is not continued. See Section 4701 (optional form of advance health care directive).

§ 4652 (repealed). Other authority not affected

Comment. Subdivision (a) of former Section 4652 is superseded by Sections 4685 (agent's priority) and 4687 (other authority of person named as agent not affected).

Subdivision (b) is continued in Section 4651(b)(2) (emergency treatment) without substantive change.

§ 4653 (repealed). Validity of durable power of attorney for health care executed elsewhere

Comment. Former Section 4653 is continued in Section 4674(a) without substantive change.

§ 4654 (repealed). Durable power of attorney for health care subject to former 7-year limit

Comment. Former Section 4654 is not continued. See Section 4665 (application of Health Care Decisions Law to existing advance directives).

§ 4700 (repealed). Requirements for durable power of attorney for health care

Comment. Former Section 4700 is superseded by Section 4671 and related provisions. See Section 4671 Comment.

§ 4701 (repealed). Witnesses of durable power of attorney for health care

Comment. Former Section 4701 is continued in Section 4673(a)-(c) without substantive change, but the witnessing rules apply only to patients in skilled nursing facilities.

§ 4702 (repealed). Limitations on who may be attorney-in-fact

Comment. Former Section 4702 is continued in Section 4659(a)-(c) without substantive change. See Section 4659 Comment.

§ 4703 (repealed). Printed form of durable power of attorney for health care

Comment. Former Section 4703 is not continued. See Section 4701 (optional form of advance health care directive).

§ 4704 (repealed). Warnings not on printed form

Comment. Former Section 4704 is not continued. See Section 4701 (optional form of advance health care directive).

§ 4720 (repealed). Attorney-in-fact's authority to make health care decisions

Comment. Subdivision (a) of former Section 4720 is continued in Sections 4682 (when agent's authority effective) and 4685 (agent's priority) without substantive change.

Subdivision (b) is continued in Section 4683 without substantive change.

Subdivision (c) is continued in Section 4684 without substantive change.

Subdivision (d) is continued in Section 4687 without substantive change.

§ 4721 (repealed). Availability of medical information to attorney-in-fact

Comment. Former Section 4721 is continued in Section 4676 without substantive change.

§ 4722 (repealed). Limitations on attorney-in-fact's authority

Comment. Former Section 4722 is continued in Section 4652 without substantive change.

§ 4723 (repealed). Unauthorized acts and omissions

Comment. Former Section 4723 is continued in Section 4653 without substantive change.

§ 4724 (repealed). Principal's objections

Comment. Former Section 4724 is superseded by Section 4659 (revocation of advance directive).

§ 4725 (repealed). Restriction on execution of durable power of attorney for health care as condition for admission, treatment, or insurance

Comment. Former Section 4725 is continued in Section 4675 without substantive change.

§ 4726 (repealed). Alteration or forging, or concealment or withholding knowledge of revocation of durable power of attorney for health care

Comment. Former Section 4726 is continued in Section 4743 without substantive change.

§ 4727 (repealed). Revocation of durable power of attorney for health care

Comment. Subdivision (a) of former Section 4727 is superseded by Section 4695(a) (revocation of advance health care directive).

Subdivision (b) is continued in Section 4731 (duty of supervising health care provider to record relevant information) without substantive change.

Subdivision (c) is continued in Section 4657 (presumption of capacity) without substantive change.

Subdivision (d) is superseded by Section 4698 (effect of later advance directive on earlier advance directive).

Subdivision (e) is continued in Section 4697 (effect of dissolution or annulment) without substantive change.

Subdivision (f) is superseded by Section 4740 (immunities of health care provider and institution). See Section 4740 Comment.

§ 4750 (repealed). Immunities of health care provider

Comment. Former Section 4750 is superseded by Section 4740. See Section 4740 Comment.

§ 4751 (repealed). Convincing evidence of identity of principal

Comment. Former Section 4751 is continued in Section 4673(d)-(e) without substantive change. The scope of the new provision is different, however. See Section 4673 Comment.

§ 4752 (repealed). Presumption concerning power executed in other jurisdiction

Comment. Former Section 4752 is continued in Section 4674(b) without substantive change.

§ 4753 (repealed). Request to forgo resuscitative measures

Comment. Former Section 4753 is continued in Part 4 (commencing with Section 4780) of Division 4.7 without substantive change. Subdivision (a) is continued in Section 4782 without substantive change.

Subdivision (b) is continued in Section 4780 without substantive change.

Subdivisions (c) and (d) are continued in Section 4783 without substantive change.

Subdivision (e) is continued in Section 4784 without change.

Subdivision (f) is continued in Section 4785 without substantive change.

Subdivision (g) is continued in Section 4781 without substantive change.

Subdivision (h) is continued in Section 4786 without substantive change.

§ 4770 (repealed). Short title

Comment. Former Section 4770 is not continued. The statutory form durable power of attorney for health care is replaced by the optional form of an advance health care directive in Section 4701.

§ 4771 (repealed). Statutory form durable power of attorney for health care

Comment. The statutory form set out in former Section 4771 is superseded by the optional advance health care directive form provided by Section 4701. See Section 4701 Comment. See also Section 4665 (application of Health Care Decisions Law to existing advance directives).

§ 4772 (repealed). Warning or lawyer's certificate

Comment. Former Section 4772 is not continued. See Section 4701 (optional advance directive form) & Comment.

§ 4773 (repealed). Formal requirements

Comment. Former Section 4773 is not continued. For execution requirements, see Section 4680. See also Sections 4700 (substantive rules applicable to form), 4701 (optional advance directive form) & Comment.

§ 4774 (repealed). Requirements for statutory form

Comment. Former Section 4774 is not continued. For execution requirements, see Section 4680. See also Sections 4700 (substantive rules applicable to form), 4701 (optional advance directive form) & Comment.

§ 4775 (repealed). Use of forms valid under prior law

Comment. Former Section 4775 is not continued. See Section 4665 (application of Health Care Decisions Law to existing advance directives).

§ 4776 (repealed). Language conferring general authority

Comment. Former Section 4776 is not continued. See Section 4701 (optional advance directive form) & Comment.

§ 4777 (repealed). Effect of documents executed by attorney-in-fact

Comment. Former Section 4777 is not continued. See Sections 4683 (scope of agent's authority), 4701 (optional advance directive form) & Comment.

§ 4778 (repealed). Termination of authority, alternate attorney-in-fact

Comment. Former Section 4778 is not continued. See Section 4701 (optional advance directive form) & Comment.

§ 4779 (repealed). Use of other forms

Comment. Former Section 4779 is superseded by Section 4700.

§ 4800 (repealed). Registry system established by Secretary of State

Comment. Former Section 4800 is continued in new Section 4800 without substantive change. However, the registry provisions in Sections 4800-4806 of former law are revised to permit registration of individual health care instructions, as well as powers of attorney for health care in new Sections 4800-4805. See new Section 4800 Comment.

§ 4801 (repealed). Identity and fees

Comment. Former Section 4801 is continued in new Section 4801 without change.

§ 4802 (repealed). Notice

Comment. Former Section 4802 is continued in new Section 4802 without substantive change. See Section 4800 Comment.

§ 4804 (repealed). Effect of failure to register

Comment. Former Section 4804 is continued in Section 4803 without substantive change. See Section 4800 Comment.

§ 4805 (repealed). Effect of registration on revocation and validity

Comment. Former Section 4805 is continued in Section 4804 without substantive change. See Section 4800 Comment.

§ 4806 (repealed). Effect on health care provider

Comment. Former Section 4806 is continued in Section 4805 without substantive change. See Section 4800 Comment.

Prob. Code §§ 4900-4947 (repealed). Judicial proceedings concerning powers of attorney

SEC. _____. Part 5 (commencing with Section 4900) of Division 4.5 of the Probate Code is repealed.

Comment. Sections 4900-4947 have been moved to a new Part 4 (commencing with Section 4500) as part of the reorganization related to enactment of the Health Care Decisions Law, Division 4.7 (commencing with Section 4600). With respect to powers of attorney for health care, this part of former law is replaced by a new Part 3 (commencing with Section 4750) in Division 4.7.

§ 4900 (repealed). Power of attorney freely exercisable

Comment. Former Section 4900 is continued in Sections 4500 (property powers) and 4750 (health care powers) without substantive change.

§ 4901 (repealed). Cumulative remedies

Comment. Former Section 4901 is continued in Sections 4501 (property powers) and 4751 (health care powers) without substantive change.

§ 4902 (repealed). Effect of provision in power of attorney limiting right to petition

Comment. Former Section 4902 is continued in Sections 4502 (property powers) and 4752 (health care powers) without substantive change.

§ 4903 (repealed). Limitations on right to petition

Comment. Former Section 4903 is continued in Sections 4503 (property powers) and 4753 (health care powers) without substantive change.

§ 4904 (repealed). Jury trial

Comment. Former Section 4904 is continued in Sections 4504 (property powers) and 4754 (health care powers) without substantive change.

§ 4905 (repealed). Application of general procedural rules

Comment. Former Section 4905 is continued in Sections 4505 (property powers) and 4755 (health care powers) without substantive change.

§ 4920 (repealed). Jurisdiction and authority of court or judge

Comment. Former Section 4920 is continued in Sections 4520 (property powers) and 4760 (health care powers) without substantive change.

§ 4921 (repealed). Basis of jurisdiction

Comment. Former Section 4921 is continued in Sections 4521 (property powers) and 4761 (health care powers) without substantive change.

§ 4922 (repealed). Jurisdiction over attorney-in-fact

Comment. Former Section 4922 is continued in Sections 4522 (property powers) and 4762 (health care powers) without substantive change.

§ 4923 (repealed). Venue

Comment. Former Section 4923 is continued in Sections 4523 (property powers) and 4763 (health care powers) without substantive change.

§ 4940 (repealed). Petitioners

Comment. Former Section 4940 is continued in Section 4540 without change, except that the reference to the treating health care provider in subdivision (h) is omitted. Powers of attorney for health care are governed by Division 4.7 (commencing with Section 4600). As to health care powers, the former section is continued in Section 4765, with several changes. See Section 4765 Comment.

§ 4941 (repealed). Petition as to powers of attorney other than for health care

Comment. As to property powers, former Section 4941 is continued in Section 4541 without change, except that the reference to powers of attorney for health care in the introductory paragraph is omitted. Powers of attorney for health care are governed by Division 4.7 (commencing with Section 4600).

§ 4942 (repealed). Petition as to durable power of attorney for health care

Comment. Former Section 4942 is continued in Section 4766 with several changes. See Section 4766 & Comment.

§ 4943 (repealed). Commencement of proceeding

Comment. Former Section 4943 is continued in Sections 4542 (property powers) and 4767 (health care powers) without substantive change.

§ 4944 (repealed). Dismissal of petition

Comment. Former Section 4944 is continued in Sections 4543 (property powers) and 4768 (health care powers) without substantive change.

§ 4945 (repealed). Notice of hearing

Comment. Former Section 4945 is continued in Sections 4544 (property powers) and 4769 (health care powers) without substantive change.

§ 4946 (repealed). Temporary health care order

Comment. Former Section 4946 is continued in Section 4770 without several changes. See Section 4770 Comment.

§ 4947 (repealed). Award of attorney's fees

Comment. Former Section 4947 is continued in Sections 4545 (property powers) and 4771 (health care powers) without substantive change.

WELFARE AND INSTITUTIONS CODE**Welf. & Inst. Code § 14110.8 (amended). Admission to nursing facility**

SEC. _____. Section 14110.8 of the Welfare and Institutions Code is amended to read:

14110.8. (a) For the purposes of this section:

(1) "Facility" means a nursing facility.

(2) "Patient" means a person who is a facility resident and a Medi-Cal beneficiary and whose facility care is being paid for in whole or in part by Medi-Cal.

(3) "Agent" means a person who manages, uses, or controls those funds or assets that legally may be used to pay the patient's share of cost and other charges not paid for by the Medi-Cal program.

(4) "Responsible party" means a person other than the patient or potential patient, who, by virtue of signing or cosigning an admissions agreement of a nursing facility, either together with, or on behalf of, a potential patient, becomes personally responsible or liable for payment of any portion of the charges incurred by the patient while in the facility. A person who signs or cosigns a facility's admissions agreement by virtue of being *an agent under a power of*

attorney for health care or an Attorney-in-Fact attorney-in-fact under a ~~valid Durable Power of Attorney~~ *durable power of attorney* executed by the potential patient or, a conservator of the person or of the estate of the potential patient, or a representative payee, is not a responsible party under this section, and does not thereby assume personal responsibility or liability for payment of any charges incurred by the patient, except to the extent that the person, or the patient's conservator or representative payee is an agent *as defined in paragraph (3)*.

(b) No facility may require or solicit, as a condition of admission into the facility, that a Medi-Cal beneficiary have a responsible party sign or cosign the admissions agreement. No facility may accept or receive, as a condition of admission into the facility, the signature or cosignature of a responsible party for a Medi-Cal beneficiary.

(c) A facility may require, as a condition of admission, where a patient has an agent, that the patient's agent sign or cosign the admissions agreement and agree to distribute to the facility promptly when due, the share of cost and any other charges not paid for by the Medi-Cal program which the patient or his or her agent has agreed to pay. The financial obligation of the agent shall be limited to the amount of the patient's funds received but not distributed to the facility. A new agent who did not sign or cosign the admissions agreement shall be held responsible to distribute funds in accordance with this section.

(d) When a patient on non-Medi-Cal status converts to Medi-Cal coverage, any security deposit paid to the facility by the patient or on the patient's behalf as a condition of admission to the facility shall be returned and the obligations and responsibilities of the patient or responsible party shall be null and void.

(e) Any agent who willfully violates the requirements of this section is guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not to exceed two thousand five hundred dollars (\$2,500) or by imprisonment in the county jail not to exceed 180 days, or both.

Comment. Subdivision (a)(4) of Section 14110.8 is amended to reflect the terminology of the Health Care Decisions Law (HCDL) (Prob. Code § 4600 *et seq.*) and to recognize that powers of attorney for health care are treated by a separate body of law from that governing other powers of attorney under the general Power of Attorney Law (PAL) (Prob. Code § 4000 *et seq.*). See, e.g., Prob. Code §§ 4014 (“attorney-in-fact” defined under PAL), 4018 (“durable power of attorney” defined under PAL), 4050 (scope of PAL), 4607 (“agent” defined under HCDL), 4629 (“power of attorney for health care” defined under HCDL), 4651 (scope of HCDL). Some additional technical, nonsubstantive revisions are made in subdivision (a)(4) for clarity and consistency with the governing language of the Probate Code.

Uncodified. Deferred operative date

SEC. _____. This act becomes operative on July 1, 2000.

REVISED COMMENTS

Prob. Code § 2 (revised comment). Continuation of existing law, construction of provisions drawn from uniform acts

Revised Comment. Section 2 continues Section 2 of the repealed Probate Code without change. See also Gov't Code §§ 9604 (reference made in statute, charter, or ordinance to provisions of one statute carried into another statute under circumstances in which they are required to be construed as restatements and continuations and not as new enactments), 9605 (construction of amended statutory provision).

Some of the provisions of this code are the same as or similar to provisions of uniform acts. Subdivision (b) provides a rule for interpretation of these provisions. Many of the provisions of this code are drawn from the Uniform Probate Code (1987). Some provisions are drawn from other uniform acts:

- Sections 220-224 — Uniform Simultaneous Death Act (1953)
- Sections 260-288 — Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act (1978)
- Sections 260-288 — Uniform Disclaimer of Transfers Under Nontestamentary Instrument Act (1978)
- Sections 3900-3925 — Uniform Transfers to Minors Act (1983)
- Sections 4001, 4124-4127, 4206, 4304-4305 — Uniform Durable Power of Attorney Act
- Sections 4400-4465 — Uniform Statutory Form Power of Attorney Act
- Sections 4670-4743 — Uniform Health-Care Decisions Act (1993)
- Sections 6300-6303 — Uniform Testamentary Additions to Trusts Act (1960)
- Sections 6380-6390 — Uniform International Wills Act (1977).
See also Section 6387 (need for uniform interpretation of Uniform International Wills Act)
- Sections 16002(a), 16003, 16045-16054 — Uniform Prudent Investor Act (1994)
- Sections 16200-16249 — Uniform Trustees' Powers Act (1964)
- Sections 16300-16313 — Revised Uniform Principal and Income Act (1962)

A number of terms and phrases are used in the Comments to the sections of the new Probate Code (including the "Background" portion of

each Comment) to indicate the sources of the new provisions and to describe how they compare with prior law. The portion of the Comment giving the background on each section of the repealed code may also use terms and phrases to indicate the source or sources of the repealed section and to describe how the repealed section compared with the prior law.

The following discussion is intended to provide guidance in interpreting the terminology most commonly used in the Comments.

(1) *Continues without change.* A new provision “continues” a former provision “without change” if the two provisions are identical or nearly so. In some cases, there may be insignificant technical differences, such as where punctuation is changed without a change in meaning. Some Comments may describe the relationship by simply stating that a new provision “continues” or is “the same as” a former provision of the repealed Probate Code, or is “the same as” a provision of the Uniform Probate Code or another uniform act.

(2) *Continues without substantive change.* A new provision “continues” a former provision “without substantive change” if the substantive law remains the same but the language differs to an insignificant degree.

(3) *Restates without substantive change.* A new provision “restates” a former provision “without substantive change” if the substantive law remains the same but the language differs to a significant degree. Some Comments may describe the new provision as being the “same in substance.”

(4) *Exceptions, additions, omissions.* If part of a former provision is “continued” or “restated,” the Comment may say that the former provision is continued or restated but also note the specific differences as “exceptions to,” “additions to,” or “omissions from” the former provision.

(5) *Generalizes, broadens, restates in general terms.* A new provision may be described as “generalizing,” “broadening,” or “restating in general terms” a provision of prior law. This description means that a limited rule has been expanded to cover a broader class of cases.

(6) *Supersedes, replaces.* A provision “supersedes” or “replaces” a former provision if the new provision deals with the same subject as the former provision but treats it in a significantly different manner.

(7) *New.* A provision is described as “new” where it has no direct source in prior statutes.

(8) *Drawn from, similar to, consistent with.* A variety of terms is used to indicate a source for a new provision, typically a source other than California statutes. For example, a provision may be “drawn from” a uniform act, model code, Restatement, or the statutes of another state. In

such cases, it may be useful to consult any available commentary or interpretation of the source from which the new provision is drawn for background information.

(9) *Codifies*. A Comment may state that a new provision “codifies” a case-law rule that has not previously been enacted into statutory law. A provision may also be described as codifying a Restatement rule, which may or may not represent previously existing common law in California.

(10) *Makes clear, clarifies*. A new provision may be described as “making clear” a particular rule or “clarifying” a rule as a way of emphasizing the rule, particularly if the situation under prior law was doubtful or contradictory.

(11) *Statement in Comment that section is “comparable” to another section*. A Comment may state that a provision is “comparable” to another provision. If the Comment to a section notes that another section is “comparable” that does not mean that the other section is the same or substantially the same. The statement is included in the Comment so that the statute user is alerted to the other section and can review the cases under that section for possible use in interpreting the section containing the statement in the Comment.

Prob. Code § 4014 (revised comment). Attorney-in-fact

Revised Comment. Subdivision (a) of Section 4014 supersedes part of former Civil Code Section 2400 and former Civil Code Section 2410(a), and is comparable to the first sentence of Civil Code Section 2295.

Subdivision (b) is comparable to Section 84 (“trustee” includes successor trustee). See Sections 4202 (multiple attorneys-in-fact), 4203 (successor attorneys-in-fact), 4205 (delegation of attorney-in-fact’s authority). The purpose of subdivision (b) is to make clear that the rules applicable to attorneys-in-fact under the Power of Attorney Law apply as well to successors and alternates of the original attorney-in-fact, and to other persons who act in place of the attorney-in-fact.

See also Sections 4022 (“power of attorney” defined), 4026 (“principal” defined).

Prob. Code § 4053 (revised comment). Recognition of durable powers of attorney executed under law of another state

Revised Comment. Section 4053 is new. This section promotes use and enforceability of durable powers of attorney executed in other states. See also Section 4018 (“durable power of attorney” defined).

Prob. Code § 4054 (revised comment). Application to existing powers of attorney and pending proceedings

Revised Comment (1994). Section 4054 is comparable to Section 15001 (application of Trust Law). Subdivision (a) provides the general rule that this division applies to all powers of attorney, regardless of when created.

Subdivision (b) is a specific application of the general rule in subdivision (a). See Section 4900 *et seq.* (judicial proceedings concerning powers of attorney). Subdivision (c) provides discretion to the court to resolve problems arising in proceedings commenced before the operative date.

For special transitional provisions, see Sections 4102 (durable power of attorney form); see also Section 4129(c) (springing powers).

See also Section 4022 (“power of attorney” defined).

Prob. Code § 4101 (revised comment). Priority of provisions of power of attorney

Revised Comment. Section 4101 is new. This section makes clear that many of the statutory rules provided in this division are subject to express or implicit limitations in the power of attorney. If a statutory rule is not subject to control by the power of attorney, this is stated explicitly, either in a particular section or as to a group of sections. See, e.g., Sections 4130 (inconsistent authority), 4151(a)(2) (revocation of power of attorney by writing), 4153(a)(2)-(3) (revocation of attorney-in-fact’s authority), 4155 (termination of authority under nondurable power of attorney on principal’s incapacity), 4206 (relation of attorney-in-fact to court-appointed fiduciary), 4207 (resignation of attorney-in-fact), 4232 (duty of loyalty), 4233 (duty to keep principal’s property separate and identified), 4234(b) (authority to disobey instructions with court approval), 4236 (duty to keep records and account; availability of records to other persons), 4502 (effect of provision in power of attorney attempting to limit right to petition), 4503 (limitations on right to petition).

See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026 (“principal” defined).

Prob. Code § 4121 (revised comment). Formalities for executing a power of attorney

Revised Comment. Section 4121 provides the general execution formalities for a power of attorney under this division. A power of attorney that complies with this section is legally sufficient as a grant of

authority to an attorney-in-fact. Special rules apply to a statutory form power of attorney. See Section 4402.

The dating requirement in subdivision (a) generalizes the rule applicable to durable powers of attorney for health care under former Civil Code Section 2432(a)(2). This rule is also consistent with the statutory forms. See Sections 4401 (statutory form power of attorney).

In subdivision (b), the requirement that a power of attorney be signed by the principal or at the principal's direction continues a rule implicit in former law. See former Civ. Code §§ 2400, 2410(c). In addition, it generalizes the rule applicable to durable powers of attorney for health care under former Civil Code Section 2432.

The requirement that the power of attorney be either acknowledged or signed by two witnesses, in subdivision (c), generalizes part of the rule applicable to durable powers of attorney for health care under former Civil Code Section 2432(a)(3). Former general rules did not require either acknowledgment or witnessing. However, the statutory form power of attorney provided for acknowledgment. See former Civ. Code § 2475 (now Prob. Code § 4401). This rule still applies to the statutory form power of attorney; witnessing does not satisfy Section 4402. Subdivision (c) provides the general rule as to witnessing; specific qualifications for witnesses are provided in Section 4122.

Nothing in this section affects the requirements concerning recordable instruments. A power of attorney legally sufficient as a grant of authority under this division must satisfy the general rules concerning recordation in Civil Code Sections 1169-1231. To facilitate recordation of a power of attorney granting authority concerning real property, the power of attorney should be acknowledged before a notary, whether or not it is witnessed.

See also Sections 4022 ("power of attorney" defined), 4026 ("principal" defined).

Prob. Code § 4124 (revised comment). Requirements for durable power of attorney

Revised Comment. Section 4124 restates former Civil Code Section 2400 without substantive change. For special rules applicable to statutory form powers of attorney, see Sections 4401, 4402. See also Section 4050 (powers subject to this division).

Section 4124 is similar to the official text of Section 1 of the Uniform Durable Power of Attorney Act (1984), Uniform Probate Code Section 5-501 (1991). See Section 2(b) (construction of provisions drawn from uniform acts). The reference in the uniform act to the principal's "disability" is omitted. Under Section 4155, it is the principal's incapacity to contract which would otherwise terminate the power of

attorney. In addition, the phrase “or lapse of time” has not been included in the language set forth in subdivision (a) of Section 4124 because it is unnecessary. As a matter of law, unless a durable power of attorney states an earlier termination date, it remains valid regardless of any lapse of time since its creation. See, e.g., Sections 4127 (lapse of time), 4152(a)(1) (termination of attorney-in-fact’s authority pursuant to terms of power of attorney).

See also Sections 4014 (“attorney-in-fact” defined), 4018 (“durable power of attorney” defined), 4022 (“power of attorney” defined), 4026 (“principal” defined).

Prob. Code § 4130 (revised comment). Inconsistent authority

Revised Comment. Section 4130 is new. See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026 (“principal” defined).

Prob. Code § 4152 (revised comment). Termination of attorney-in-fact’s authority

Revised Comment. Section 4152 is drawn from the general agency rules provided in Civil Code Sections 2355 and 2356. This section continues the substance of former law as to termination of the authority of an attorney-in-fact under a power of attorney. For a special rule as to termination of nondurable powers of attorney on principal’s incapacity, see Section 4155.

Subdivision (a)(1) is the same as Civil Code Section 2355(a). Subdivision (a)(2) is the same as Civil Code Section 2355(b), but the reference to fulfillment of the purpose of the power of attorney is new. Subdivision (a)(3) is the same as Civil Code Section 2356(a)(1). These subdivisions recognize that the authority of an attorney-in-fact necessarily ceases when the underlying power of attorney is terminated.

Subdivision (a)(4) is the same as Civil Code Section 2356(a)(2), but recognizes that certain tasks may remain to be performed after death. See, e.g., Sections 4238 (attorney-in-fact’s duties on termination of authority).

Subdivision (a)(5) is generalized from Civil Code Section 2355(c)-(f). Subdivision (a)(6) is similar to Civil Code Section 2355(d) (renunciation by agent). For the manner of resignation, see Section 4207. Subdivision (a)(7) is similar to Civil Code Section 2355(e). Subdivision (a)(8) cross-refers to the rules governing the effect of dissolution and annulment of marriage. Subdivision (a)(9) is the same as Civil Code Section 2355(c).

Subdivision (b) preserves the substance of the introductory clause of Civil Code Section 2355 and Civil Code Section 2356(b), which protect persons without notice of events that terminate an agency.

See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026 (“principal” defined), 4034 (“third person” defined); Civ. Code § 1216 (recordation of revocation of recorded instruments).

Prob. Code § 4200 (revised comment). Qualifications of attorney-in-fact

Revised Comment. Section 4200 supersedes the last part of Civil Code Section 2296 (“any person may be an agent”) to the extent that it applied to attorneys-in-fact under powers of attorney.

See also Sections 56 (“person” defined), 4014 (“attorney-in-fact” defined).

Prob. Code § 4207 (revised comment). Resignation of attorney-in-fact

Revised Comment. Section 4207 is new. For judicial procedures for approving the attorney-in-fact’s resignation, see Section 4541(e) (petition as to power of attorney other than durable power of attorney for health care).

See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026 (“principal” defined).

Prob. Code § 4234 (revised comment). Duty to keep principal informed and follow instructions

Revised Comment. Section 4234 is drawn from general agency rules. The duty to follow the principal’s instructions is consistent with the general agency rule in Civil Code Section 2309. See also Civ. Code § 2019 (agent not to exceed limits of actual authority). The duty to communicate with the principal is consistent with the general agency rule in Civil Code Sections 2020 and 2332.

Subdivision (b) is a limitation on the general agency rule in Civil Code Section 2320 (power to disobey instructions). For provisions relating to judicial proceedings, see Section 4500 *et seq.*

See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026 (“principal” defined).

Prob. Code § 4235 (revised comment). Consultation and disclosure

Revised Comment. Section 4235 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.714(4) (Vernon 1990).

This section does not provide anything inconsistent with permissible practice under former law, but is intended to recognize the desirability of consultation in appropriate circumstances and provide assurance to third persons that consultation with the attorney-in-fact is proper and does not contravene privacy rights. See also Section 4455(f) (receipt of bank statements, etc., under statutory form powers of attorney). The right to obtain information may be enforced pursuant to Section 4541(f).

See also Sections 4014 (“attorney-in-fact” defined), 4026 (“principal” defined).

Prob. Code § 4236 (revised comment). Duty to keep records and account, availability of records to other persons

Revised Comment. Section 4236 is drawn in part from Minnesota law. See Minn. Stat. Ann. § 523.21 (West Supp. 1994). For provisions relating to judicial proceedings, see Section 4500 *et seq.*

See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026 (“principal” defined).

Prob. Code § 4300 (revised comment). Third persons required to respect attorney-in-fact’s authority

Revised Comment. Section 4300 is new. This section provides the basic rule concerning the position of an attorney-in-fact: that the attorney-in-fact acts in place of the principal, within the scope of the power of attorney, and is to be treated as if the principal were acting. The second sentence generalizes a rule in former Civil Code Section 2480.5, which was applicable only to the Uniform Statutory Form Power of Attorney. Under this rule, a third person may be compelled to honor a power of attorney only to the extent that the principal, disregarding any legal disability, could bring an action to compel the third person to act. A third person who could not be forced to do business with the principal consequently may not be forced to deal with the attorney-in-fact. However, a third person who holds property of the principal, who owes a debt to the principal, or who is obligated by contract to the principal may be compelled to accept the attorney-in-fact’s authority.

This general rule is subject to some specific exceptions. See, e.g., Sections 4309 (prior breach by attorney-in-fact), 4310 (transactions relating to accounts and loans in financial institution).

See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026 (“principal” defined), 4034 (“third person” defined).

Prob. Code § 4301 (revised comment). Reliance by third person on general authority

Revised Comment. Section 4301 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.710(8) (Vernon 1990). This general rule is subject to specific limitations provided elsewhere. See, e.g., Sections 4264 (authority that must be specifically granted).

See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4034 (“third person” defined).

Prob. Code § 4302 (revised comment). Identification of attorney-in-fact and principal

Revised Comment. Section 4302 is drawn in part from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.719(4) (Vernon 1990). See also former Civ. Code § 2512(a)(1) (presentation by attorney-in-fact named in power of attorney) & Comment.

See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026 (“principal” defined), 4034 (“third person” defined).

Prob. Code § 4303 (revised comment). Protection of third person relying in good faith on power of attorney

Revised Comment. Section 4303 continues former Civil Code Section 2512 without substantive change, with the addition of the witnessing rule in subdivision (a)(3). This section is intended to ensure that a power of attorney, whether durable or nondurable, will be accepted and relied on by third persons. The person presenting the power of attorney must actually be the attorney-in-fact designated in the power of attorney. If the person purporting to be the attorney-in-fact is an impostor, the immunity does not apply. The third person can rely in good faith on the notary public’s certificate of acknowledgment or the signatures of the witnesses that the person who executed the power of attorney is the principal.

Subdivision (b) makes clear that this section provides an immunity from liability where the requirements of the section are satisfied. This section has no relevance in determining whether or not a third person who acts in reliance on a power of attorney is liable under the circumstances where, for example, the power of attorney does not include a notary public’s certificate of acknowledgment.

For other immunity provisions not affected by Section 4303, see, e.g., Sections 4128(b) (reliance in good faith on durable power of attorney not containing “warning” statement required by Section 4128), 4301 (reliance by third person on general authority), 4304 (lack of knowledge of death or incapacity of principal). See also Section 3720 (“Any person

who acts in reliance upon the power of attorney [of an absentee as defined in Section 1403] when accompanied by a copy of a certificate of missing status is not liable for relying and acting upon the power of attorney.”).

See also Sections 4014 (“attorney-in-fact” defined), 4018 (“durable power of attorney” defined), 4022 (“power of attorney” defined), 4026 (“principal” defined), 4034 (“third person” defined).

Prob. Code § 4307 (revised comment). Certified copy of power of attorney

Revised Comment. Section 4307 is new. This section facilitates use of a power of attorney executed in this state as well as powers of attorney executed in other states. Subdivision (d) makes clear that certification under this section is not a requirement for use of copies of powers of attorney. This recognizes, for example, the existing practice of good faith reliance on copies of durable powers of attorney for health care. See former Section 4750 (immunities of health care provider); new Section 4740.

See also Section 4022 (“power of attorney” defined).

Prob. Code § 4401 (revised comment). Statutory form power of attorney

Revised Comment. Section 4401 continues former Civil Code Section 2475 without change, except for the revision of cross-references to other provisions, the restoration of language erroneously omitted in 1993, and inclusion of a general reference to the law governing the notary’s certificate of acknowledgment. Section 4401 is the same in substance as Section 1(a) of the Uniform Statutory Form Power of Attorney Act (1988), with the addition of provisions to permit designation of co-agents. See Section 2(b) (construction of provisions drawn from uniform acts).

The provisions added by former Civil Code Section 2475 were drawn from the former Statutory Short Form Power of Attorney statute. See former Civ. Code § 2450 (repealed by 1990 Cal. Stat. ch. 986, § 1). The acknowledgment portion of the form was revised to be consistent with the form used under California law. The word “incapacitated” was substituted for the words “disabled, incapacitated, or incompetent” used in the uniform act. This substitution conforms the statutory form to the California version of the Uniform Durable Power of Attorney Act. See Section 4018 (requirements for creation of durable power of attorney).

Section 4401 provides the text of the form that is sufficient and necessary to bring this part into operation. The statutory form can be

used in whole or part instead of individually drafted forms or forms adapted from a form book.

A form used to create a power of attorney subject to this part should use the language provided in Section 4401. Minor variances in wording will not take it out of the scope of the part. For example, the use of the language of the official text of the uniform act in the last paragraph of the text of the statutory form (protection of third party who receives a copy of the statutory form power of attorney and acts in reliance on it) instead of the language provided in Section 4401 does not take the form out of the scope of this part. See Section 4402(a). Nor does the omission of the provisions relating to designation of co-agents take the form out of the scope of this part. See Section 4402(a).

After the introductory phrase, the term “agent” is used throughout the uniform act in place of the longer and less familiar “attorney-in-fact.” Special effort is made throughout the uniform act to make the language as informal as possible without impairing its effectiveness.

The statutory form contains a list of powers. The powers listed relate to various separate classes of activities, except the last, which includes all the others. Health care matters are not included. For a power of attorney form for health care, see Section 4701.

Space is provided in the statutory form for “Special Instructions.” In this space, the principal can add specially drafted provisions limiting or extending the powers granted to the agent. (If the space provided is not sufficient, a reference can be made in this space to an attached sheet or sheets, and the special provisions can be included on the attached sheet or sheets.)

The statutory form contains only a limited list of powers. If it is desired to give the agent the broadest possible powers, language similar to the following can be added under the “Special Instructions” portion of the form:

In addition to all of the powers listed in lines (A) to (M) above, I grant to my agent full power and authority to act for me, in any way which I myself could act if I were personally present and able to act, with respect to all other matters and affairs not listed in lines (A) to (M) above, but this authority does not include authority to make health care decisions.

Neither the form in this section, nor the constructional provisions in Sections 4450-4465, attempt to allow the grant of the power to make a will or to give the agent extensive estate planning authority, although several of the powers, especially lines (G), (H), and (L) of the statutory form, may be useful in planning the disposition of an estate. An

individually tailored power of attorney can be used if the principal wants to give the agent extensive estate planning authority, or additional estate planning powers can be granted to the agent by stating those additional powers in the space provided in the form for “Special Instructions.” For example, provisions like the following might be included under the special instructions portion of the statutory form:

In addition to the powers listed in lines (A) to (M) above, the agent is empowered to do all of the following:

(1) Establish a trust with property of the principal for the benefit of the principal and the spouse and descendants of the principal, or any one or more of them, upon such terms as the agent determines are necessary or proper, and transfer any property in which the principal has an interest to the trust.

(2) Exercise in whole or in part, release, or let lapse any power the principal may have under any trust whether or not created by the principal, including any power of appointment, revocation, or withdrawal, but a trust created by the principal may only be modified or revoked by the agent as provided in the trust instrument.

(3) Make a gift, grant, or other transfer without consideration to or for the benefit of the spouse or descendants of the principal or a charitable organization, or more than one or all of them, either outright or in trust, including the forgiveness of indebtedness and the completion of any charitable pledges the principal may have made; consent to the splitting of gifts under Internal Revenue Code Section 2513, or successor sections, if the spouse of the principal makes gifts to any one or more of the descendants of the principal or to a charitable institution; pay any gift tax that may arise by reason of those gifts.

(4) Loan any of the property of the principal to the spouse or descendants of the principal, or their personal representatives or a trustee for their benefit, the loan bearing such interest, and to be secured or unsecured, as the agent determines advisable.

(5) In general, and in addition to all the specific acts enumerated, do any other act which the principal can do through an agent for the welfare of the spouse, children, or dependents of the principal or for the preservation and maintenance of other personal relationships of the principal to parents, relatives, friends, and organizations.

It should be noted that a trust may not be modified or revoked by an agent under a statutory form power of attorney unless it is expressly permitted by the instrument granting the power and by the trust instrument. See Section 15401(b).

Section 4404 and the statutory form itself make the power of attorney a durable power of attorney, remaining in effect after the incapacity of the principal, unless the person executing the form strikes out the language in the form that makes the instrument a durable power of attorney. See also Section 4018 (“durable power of attorney” defined).

The last paragraph of the text of the statutory form protects a third party who receives a copy of the statutory form power of attorney and acts in reliance on it. See also Section 4034 (“third person” defined). The statement in the statutory form — that revocation of the power of attorney is not effective as to a third party until the third party has actual knowledge of the revocation — is consistent with Sections 4304 (good faith reliance on power of attorney without actual knowledge of death or incapacity of principal), 4305 (affidavit of lack of knowledge of termination of power). See also Sections 4300 (third persons required to respect agent’s authority), 4301 (immunities of third person), 4303 (protection of person who acts in good faith reliance upon power of attorney where specified requirements are satisfied). The protection provided by these sections and other immunities that may protect persons who rely on a power of attorney (see Section 4303(b)) apply to a statutory form power of attorney. See Sections 4100 (application of division to statutory form power of attorney), 4407 (general provisions applicable to statutory form power of attorney).

The language of the last portion of the text of the statutory form set forth in Section 4401 substitutes the phrase “has actual knowledge of the revocation” for the phrase “learns of the revocation” which is used in the uniform act form. This substitution does not preclude use of a form including the uniform act language. See Section 4402(a) (third sentence).

Neither this section, nor the part as a whole, attempts to provide an exclusive method for creating a power of attorney. Other forms may be used and other law employed to create powers of attorney. See Section 4408. However, this part should be sufficient for most purposes.

For provisions relating to court enforcement of the duties of the agent, see Sections 4500-4545.

The form provided by Section 4401 supersedes the former statutory short form power of attorney under former Civil Code Sections 2450-2473 (repealed by 1990 Cal. Stat. ch. 986, § 1). But older forms consistent with former Civil Code Sections 2450-2473 are still effective. See Section 4409 & Comment.

See also Sections 4014 (“attorney-in-fact” defined to include agent), 4026 (“principal” defined), 4034 (“third person” defined).

Prob. Code § 4405 (revised comment). Springing statutory form power of attorney

Revised Comment. Section 4405 continues former Civil Code Section 2479 without substantive change. Section 4405 is not found in the Uniform Statutory Form Power of Attorney Act (1988). This section is drawn from Section 5-1602 of the New York General Obligations Law. A provision described in subdivision (a) protects a third person who relies on the declaration under penalty of perjury of the person or persons designated in the power of attorney that the specified event or contingency has occurred. The principal may designate the agent or another person, or several persons, to make this declaration.

Subdivision (d) makes clear that subdivisions (a) and (b) are not the exclusive method for creating a “springing power” (a power of attorney that goes into effect upon the occurrence of a specified event or contingency). The principal is free to set forth in a power of attorney under this part any provision the principal desires to provide for the method of determining whether the specified event or contingency has occurred. For example, the principal may provide that his or her “incapacity” be determined by a court under Part 4 (commencing with Section 4500). See Section 4541(a). If the power of attorney provides only that it shall become effective “upon the incapacity of the principal,” the determination whether the power of attorney is in effect also may be made under Part 4(commencing with Section 4500).

See also Sections 4026 (“principal” defined), 4030 (“springing power of attorney” defined).

Prob. Code § 4407 (revised comment). General provisions applicable to statutory form power of attorney

Revised Comment. Section 4407 restates the substance of former Civil Code Section 2480. Section 4407 makes clear that the general provisions that apply to powers of attorney generally apply to statutory form powers of attorney under this part. Thus, for example, the following provisions apply to a power of attorney under this part:

Section 4123(b) (application of power of attorney to all or part of principal’s property; unnecessary to describe items or parcels of property).

Section 4124 (requirements for durable power of attorney). The statutory form set forth in Section 4401 satisfies the requirements for creation of a durable power of attorney, unless the provision making the power of attorney durable is struck out on the form.

Section 4125 (effect of acts by attorney-in-fact during incapacity of principal).

Section 4206 (relation of attorney-in-fact to court-appointed fiduciary).

Section 4303 (protection of person relying in good faith on power of attorney).

Section 4304 (good faith reliance on power of attorney after death or incapacity of principal).

Section 4306 (good faith reliance on attorney-in-fact's affidavit as conclusive proof of the nonrevocation or nontermination of the power).

Sections 4500-4545 (judicial proceedings).

Prob. Code § 4450 (revised comment). Construction of powers generally

Revised Comment. Section 4450 continues former Civil Code Section 2485 without change, except for the revision of a cross-reference to another provision. Section 4450 is the same in substance as Section 3 of the Uniform Statutory Form Power of Attorney Act (1988). See Section 2(b) (construction of provisions drawn from uniform acts). See the Comment to this chapter under the chapter heading. See also Sections 4500-4545 (court enforcement of agent's duties).

See also Sections 4014 ("attorney-in-fact" defined to include agent), 4022 ("power of attorney" defined), 4026 ("principal" defined).

Table Showing Location of UHCDA Provisions in Proposed Law

UHCDA	Prop. Law	UHCDA	Prop. Law
1(1)	4605	5(f)	4714
1(2)	4607(a)	5(g)	4750(c)
1(3)	4609	5(h)	4715
1(4)	4613	5(i)	see 4659
1(5)	4615	5(j)	see 4712(d)
1(6)	4617	6(a)	
1(7)	4619	6(b)	4685
1(8)	4621	6(c)	<i>Drabick</i>
1(9)	4623	7(a)	4730
1(10)	56	7(b)	4731
1(11)	4627	7(c)	4732
1(12)	4629	7(d)	4733
1(13)	4631	7(e)	4734
1(14)	4635	7(f)	4735
1(15)	74	7(g)	4736
1(16)	4641	7(h)	4675
1(17)	4643	8	4676
2(a)	4670	9(a)	4740
2(b) snt. 1	4671(a), 4683(a)	9(b)	4741
2(b) snt. 2	4629, 4680(b)	10(a)	4742(a)
2(b) snt. 3	4671(a)	10(b)	4742(b)
2(b) snt. 4	see 4659	11(a)	4651(b)(1)
2(c)	4682	11(b)	4657
2(d)	4658	12	4660
2(e)	4684	13(a)	4655(a)
2(f)	4750(b)	13(b)	4656
2(g)	4672	13(c)	4653
2(h)	4674	13(d)	4654
3(a)	4695(a)	13(e)	see 4652(a)
3(b)	4695(b)	13(f)	no
3(c)	4696	14	see 4750 <i>ff</i>
3(d)	see 4697	15	2(b)
3(e)	4698	16	see part heading at 4670
4 intro ¶.....	4700	17	11
4 form	4701	18	3, 4665 <i>ff</i>
5(a)	4710, see 4658		
5(b)	4711, see 4712(a)-(c)		
5(c)	see 4712(a)-(c)		
5(d)	4713(a)		
5(e)	see 4712(b)		

